IN THE

Supreme Court of the United States

No. 05-

SAUDI BASIC INDUSTRIES CORPORATION,

Petitioner,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC., AND EXXON CHEMICAL ARABIA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

Saudi Basic Industries Corporation (SABIC) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Delaware in this case.

INTRODUCTION

This case presents the question whether, consistent with federal common law principles necessary to maintain comity among nations, a state supreme court deciding matters of foreign law may categorically refuse even to consider an official statement from the foreign sovereign explaining the substance of its law. Here, the Delaware Supreme Court's refusal to consider an official statement from the Saudi government led it to affirm the largest award of damages in Delaware history even though that award is based squarely on errors of Saudi law. More broadly, the court's decision conflicts with the rule prevailing in the federal and

most state courts in cases involving questions of foreign law; involves manifest offense to a foreign sovereign—as confirmed by the amicus brief filed by the Kingdom of Saudi Arabia in this case; and raises important issues of international comity and federal common law. It warrants review and correction by this Court.

The underlying dispute arises out of two joint ventures formed to manufacture polyethylene in Saudi Arabia. The dispute is governed by Saudi Arabian law, but it was litigated in the Delaware state courts. To ascertain the applicable Saudi law, the trial court first considered submissions from the parties, and then appointed its own neutral expert. The neutral expert's report supported SABIC's position in key respects. Nonetheless the trial court, expressing frustration about the difficulty of ascertaining Saudi law, made contrary rulings on issues critical to both liability and damages. Those rulings provided the only support for most of the jury's award of $416.8 million—the largest damage award in Delaware history.

On appeal SABIC sought to clarify the Saudi law issues by submitting an official statement from the Saudi Arabian Ministry of Justice, explaining pertinent principles of Saudi Arabian law. The Delaware Supreme Court refused even to receive or consider the Ministry's statement, solely because it had not been presented first to the trial court. Having ignored the Ministry's statement, the court held it had "no basis . . . to overturn" the trial court's rulings. App. 50a.

The federal courts have consistently held that a statement from a foreign sovereign about the substance of its own law must be received and considered as relevant authority, even if it becomes available for the first time on appeal. Most States have adopted similar rules. The Supreme Court of Delaware and some other state courts, however, have refused to consider materials bearing on foreign law unless they were first presented to the trial court. Where the material in question is the statement of a foreign sovereign, with respect to the substance of the sovereign's own law, that refusal implicates questions of foreign relations and

international comity that must not be made subject to varying state rules. This Court should make clear that federal common law requires any U.S. court—state or federal—deciding issues under a foreign sovereign's law to receive and consider an official statement from that sovereign regarding the substance of its law.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware affirming the trial court's judgment (App. 1a-60a) is reported at 866 A.2d 1. The court's order denying SABIC's alternative motions for acceptance of an official statement of Saudi law or for remand for consideration of that statement (App. 61a) is not reported. The court's order denying SABIC's request for reargument (App. 89a-93a) is also unreported. The trial court's opinions on relevant post-trial motions (App. 63a-73a, 75a-83a) are not officially reported, but they are available at 2003 WL 22016864 and 2003 WL 22016843. The trial court's oral pre-trial ruling on Saudi law (App. 85a-87a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on January 14, 2005. A motion for reargument was denied on February 22, 2005. On May 5, 2005, Justice Souter extended the time for filing a petition for a writ of certiorari to and including July 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 202(e) of the Delaware Rules of Evidence provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible

> under these rules. The court's determination shall be treated as a ruling on a question of law.

2. Rule 44.1 of the Delaware Superior Court Rules of Civil Procedure provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in the party's pleadings or other reasonable written notice. The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law.

3. Rule 44.1 of the Federal Rules of Civil Procedure provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

STATEMENT

The federal question presented in this case is straightforward, but the background requires some explanation. We describe briefly the background of the parties' dispute; the litigation of critical Saudi law issues before trial, culminating in the trial court's erroneous rulings; and the Delaware Supreme Court's ensuing refusal to consider an official statement concerning pertinent points of Saudi law provided by the Saudi Ministry of Justice, which if considered would have left the court no choice but to reverse. It is the state supreme court's refusal even to consider the Saudi government's statement that violates principles of comity that bind

all U.S. courts, state and federal, as a matter of federal common law.

1. ***The Parties' Contract Dispute.*** Petitioner SABIC is a Saudi Arabian corporation, 70% owned by the Kingdom of Saudi Arabia. It was formed in 1976 to help develop and diversify the Kingdom's industrial base. App. 3a. In April 1980, SABIC established separate joint ventures with respondents Mobil Yanbu Petrochemical Company, Inc., then a subsidiary of Mobil Oil Corporation, and Exxon Chemical Arabia, Inc., then a subsidiary of Exxon Corporation, to manufacture polyethylene in Saudi Arabia. App. 1a n.2 & 3a. Since 1999, both respondents have been subsidiaries of one multinational conglomerate, Exxon Mobil Corporation. Like the courts below, we sometimes refer to respondents as ExxonMobil.

In September 1980, SABIC acquired certain polyethylene manufacturing technology from Union Carbide Corporation. App. 4a-5a. It licensed that technology to the joint ventures. *Id.* The royalties SABIC collected from the joint ventures were higher than the ongoing payments it made to Union Carbide. App. 5a-6a.

Twenty years later, after other disputes had arisen between the parties, respondents claimed to have discovered for the first time that SABIC had secretly charged the joint ventures more than it paid Union Carbide. They alleged that any such differential violated the original joint-venture agreements. SABIC disputed respondents' claims on various grounds. The parties' dispute is governed by Saudi law.

2. ***The Saudi Law Issues.*** In July 2000, SABIC asked the Delaware Superior Court to declare that the fees it charged the joint ventures did not violate respondents' contract rights. App. 8a; *see* Del. S. Ct. App. A106-A112.[1] Re-

[1] At the time of suit the parties were already before a federal district court in New Jersey, litigating SABIC's claim that Exxon violated the rights of one of the joint ventures by claiming exclusive rights to technology that was developed for the joint venture. *See* App. 7a-8a; *SABIC* v. *Exxon Corp.*, 364 F.3d 106, 108 (3d Cir. 2004). ExxonMobil sought to

spondents counterclaimed for breach of contract, and included a claim for "breach[] of fiduciary duty." App. 8a; Del. S. Ct. App. A132-A138.

In September 2002, the parties exchanged expert reports on Saudi law. *See* App. 135a-154a (Vogel), 125a-133a (Hallaq). The experts agreed that Saudi law is drawn in principle from the *Qur'an* and the teachings of the Prophet Muhammad, as elaborated primarily in scholarly texts rather than in written codes or reported court decisions. App. 137a (Vogel), 127a-128a (Hallaq); *see* App. 176a-177a (Wolfson). Of the four major schools of legal thought in the Sunni branch of Islam, Saudi jurists generally follow the Hanbali school. App. 138a (Vogel), 128a (Hallaq); *see* App. 181a (Wolfson).

a. ***Hallaq.*** The report of respondents' expert Wael Hallaq, a professor at McGill University, for the first time linked respondents' "fiduciary duty" claim to the Saudi law concept of *"ghasb,"* generally translated as "usurpation." *See* App. 2a n.3, 128a-129a. On that basis Professor Hallaq argued that ExxonMobil's potential damages went far beyond those available for breach of contract under Saudi law.

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bring the present dispute before the New Jersey federal court by filing a separate action in that court. *See* App. 8a n.8. The district court consolidated the suits and rejected SABIC's claim of immunity under the Foreign Sovereign Immunities Act. *Id.*; *SABIC* v. *ExxonMobil Corp.*, 194 F. Supp. 2d 378, 383, 401-411, 416 (D.N.J. 2002). After the Delaware trial court rendered its judgment in the present case, the Third Circuit vacated the district court's judgment under the *Rooker-Feldman* doctrine. *Exxon Mobil Corp.* v. *SABIC*, 364 F.3d 102, 104-106 (3d Cir. 2004). This Court reversed that judgment in March 2005, noting both the intervening decision by the Delaware Supreme Court in this case and the possibility that SABIC would seek review of that decision in this Court. *Exxon Mobil Corp.* v. *SABIC*, 125 S. Ct. 1517, 1526 n.7 (2005) (No. 03-1696). The second New Jersey case remains pending in the Third Circuit, on remand from this Court. SABIC prevailed on a different appeal in the first New Jersey action, *SABIC* v. *Exxon Corp.*, *supra*, and that dispute remains pending in the district court—as does a third New Jersey case, brought by ExxonMobil and involving related matters. *ExxonMobil Corp.* v. *SABIC*, No. 04-4900 (WHW) (D.N.J.).

Contract damages redress only direct losses, not lost profits or other remote harms. Hallaq contended that *ghasb* damages could include any profits SABIC earned, over a period of 20 years, by using in its business any funds "usurped" from the joint ventures. App. 130a-131a.[2]

b. ***Vogel.*** SABIC's expert, Frank Vogel, a professor of Islamic Legal Studies at Harvard Law School, contested Hallaq's approach. App. 157a-167a. He pointed out that in defining *ghasb* Hanbali scholars specifically distinguished it from forms of unlawful taking that are "deceptive or secretive," such as taking by stealth, embezzlement, fraud, or betrayal of trust. App. 159a-162a. Moreover, although in some contexts recovery for *ghasb* could include the "use value" of usurped property or certain actual, traceable profits realized by the usurper, a Saudi court would never impose such damages in a commercial context where the property "usurped" was money and the amount of resulting "profit" was speculative. App. 162a-167a. Vogel stressed that while the "basic idea" of "invoking the broader damage measure . . . for usurpation to expand contract damages" had been advanced as a proposal to "reform" Saudi law, any such innovation would "attract a great deal of attention." App. 158a-159a. In 20 years of "close familiarity" with the Saudi legal system, he had "never heard of any such result." App. 159a.

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[2] This petition focuses on the "fiduciary duty" or "*ghasb*" claims, which are sufficient to place the question presented in sharp relief. As to breach of contract, ExxonMobil alleged that SABIC's charges for the Union Carbide technology violated a provision of the original joint venture agreements. SABIC responded that, among other things, provision of the technology was governed not by those agreements but by the later, specific, fully integrated technology license agreements that SABIC entered into with each joint venture. *See, e.g.*, App. 31a, 37a; Del. S. Ct. App. A269-A271, A300, A2654-A2655 (expert reports explaining that a detailed agreement among partners, or between a partnership and one of its partners, supersedes any provision relating to the same subject in an earlier general partnership agreement, particularly where the later agreement has an express integration clause); *see also* note 5 below.

c. ***The Court's Expert (Wolfson).*** SABIC suggested that the trial court hear in person from Professors Hallaq and Vogel on these and other Saudi law issues. Del. S. Ct. App. A414 (12/19/02 Tr. 220). A hearing held then would have come two and a half months before trial was scheduled to start, allowing time to address any initial misunderstanding. The court, however, decided first to engage "a truly independent court-appointed expert" so that it could "get an education from somebody who has no dog in the fight." *Id.* at A414-A415 (12/19/02 Tr. at 220-221). The court itself located Herbert Wolfson, an American lawyer with training and experience in Islamic law, including the law of Saudi Arabia. *See* App. 66a; 169a-171a. It asked him to offer independent opinions on specified questions, including "Under Saudi Arabian law, what are the elements of the tort of *ghasb*?" and "If ExxonMobil is successful in demonstrating liability, is ExxonMobil entitled under Saudi Arabian law to recover for SABIC's use of ExxonMobil's property, in addition to the return of ExxonMobil's property?" App. 172a.

On February 21, 2003, Wolfson delivered his preliminary answers. App. 169a-217a. Although he perceived "no single, binding definition of *ghasb*, but rather a range of possibilities," he agreed with Professor Vogel that authoritative scholarly works "take pains to distinguish *ghasb* from other forms of wrongful taking," including takings involving "guile or deception." App. 190a-191a. He further agreed that it was "clearly inaccurate" for Professor Hallaq to characterize *ghasb* as "broad enough to encompass any wrongful taking." App. 190a. Rather, both authoritative texts and contemporary understanding limit *ghasb* to situations in which a taking is both "without consent" and "open"—that is, lacking in "stealth," with an implication that the victim is conscious of being wronged. App. 192a-194a; *see* App. 172a-173a, 198a (including taking "openly and notoriously" as an element of *ghasb*).

As to damages, Wolfson identified "three broad categories under which ExxonMobil might seek compensation for the use of its property by SABIC, in addition to the return

of such property": interest, lost profits, or profits earned by SABIC using the allegedly "usurped" property. App. 200a. The first two categories were clearly not available under Saudi law—interest because Islamic law forbids all "usury," and lost profits because they are "inherently speculative." App. 200a-202a. The third category, he concluded, was theoretically available as a remedy for *ghasb* in "special circumstances" and subject to a "complex series of rules"; but he was "not aware of any cases in the Saudi Arabian courts in which this remedy ha[d] been awarded." App. 202a-203a. Because of the importance of the issue, Wolfson obtained the court's permission to extend his mandate and travel to Saudi Arabia to conduct additional research. App. 173a, 182a-183a, 200a.

On March 5, 2003, Wolfson submitted a supplemental report. App. 219a-233a. Based on his further research in the Kingdom, he confirmed the existence and importance of a defining aspect of *ghasb* focusing on the linked concepts of lack of concealment by the wrongdoer and knowledge of the wrong by the victim. App. 222a-223a. He clarified that "current Saudi Arabian practice places greater emphasis on a subjective analysis of the victim's knowledge, and less emphasis on objective aspects of the wrongdoer's conduct." App. 222a; *see* App. 223a.

Wolfson further noted that while in his view damages based on "profits earned by the wrongdoer" were "theoretically" available for *ghasb*, that point was likely "moot" in this case because "in practice a Saudi Arabian judge [would be] unlikely to award compensation in excess of the principal value of the property taken." App. 224a. Professor Vogel, he concluded, was "absolutely correct when he asserts that a contemporary Saudi Arabian judge is unlikely to award the actual revenues remedy in actual practice, at least in respect of money." App. 230a-231a. Thus, even if a Saudi court held that ExxonMobil had established a case of *ghasb*, in the absence of "unusual facts and compelling circumstances" the court "would be unlikely to exercise its discretion" to award

damages in any amount greater than the alleged overcharges themselves. App. 232a.

3. ***The Trial Court's Rulings.*** On March 7, 2003—two days after Wolfson submitted his supplemental report, and the Friday before the Monday the trial began—the trial court held a hearing at which all three experts appeared for cross- and re-direct examination. At the end of that hearing, the court ruled on the issues of Saudi law. *See* App. 85a-87a. As to the elements of *ghasb*, it included an element of "without consent," which it held to require "blatant or reckless disregard for the property rights of another." App. 87a. It expressly rejected any element of lack of stealth or concealment on the part of the wrongdoer, or corresponding knowledge or awareness on the part of the victim. App. 86a. And it ruled that if respondents submitted evidence of *ghasb* then they could also seek additional damages, measured by SABIC's profits on the "usurped" funds. App. 87a.

After a two-week trial, the court submitted the case to the jury, over SABIC's objections, on instructions that reflected the court's own novel definition of *ghasb*. Del. S. Ct. App. A75, A2595-A2597; *see* App. 86a-87a. As to damages, the court rejected SABIC's proposal to give the jury, at a minimum, guidance concerning under what "unusual and compelling circumstances" it might award additional damages (beyond the direct-loss damages available for breach of contract) based on a finding of *ghasb*. *See* Del. S. Ct. App. A2598-A2600. It instructed the jury only that "[i]f you find ... usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operations the money, if any, that was usurped from" the joint ventures. App. 55a, 79a.

The jury found in favor of respondents. For breach of contract it awarded damages of $92.8 million—the amount it found SABIC had overcharged the joint ventures. Beyond that, it awarded $324 million based on evidence offered by respondents of how the $92.8 million would have grown, over 20 years, at a rate supposedly based on the profitability of

SABIC's overall operations. *See* Del. S. Ct. App. B307-B308, B327-B328. The larger award rested solely on the *ghasb* claim.

In post-trial motions, SABIC renewed its arguments that the court had erred in its determinations of Saudi law with respect to the elements of, and the damages properly available for, *ghasb*. It supported those arguments with additional expert submissions (App. 235a-253a, 271a-298a), and respondents replied with an extra submission of their own (App. 255a-270a.). The court denied SABIC's motions (App. 63a-73a; 75a-83a) and entered judgment on the jury's verdict.

Both before trial and in its post-trial opinions, the trial court expressed frustration at the difficulties it faced in seeking to understand contemporary practice in a foreign legal system that relies to a large extent on the judgment of individual jurists, applying principles drawn from religious and scholarly texts—and in which judicial decisions are not publicly reported. *See* App. 86a (basing refusal to recognize an openness/knowledge element in part on "the absence of reported case law and any ability to get a meaningful insight or idea as to how even the majority of Saudi judges might approach this particular element"); App. 68a-69a, 70a; 77a ("because Saudi law decisions are not published, . . . the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages").

4. ***The Saudi Ministry's Statement.*** On appeal, issues of Saudi law—like issues of U.S. law—were subject to *de novo* review. App. 42a. In an effort to address the difficulties perceived by the trial court, SABIC asked the Saudi Ministry of Justice to provide a statement "clarify[ing] the status of the Saudi law as applied [in Saudi courts] with respect to" issues central to this case, including "ghasb (usurpation), its basis and elements, [and] the compensation which may be awarded as a result thereof." App. 299a-300a. The Ministry's response confirms, among other things, that *ghasb* is distinguishable from other forms of wrongful tak-

ing, such as embezzlement or cheating, in part because "the usurper does not hide . . ., but rather he takes the property by way of openness, notoriety, force, aggression and injustice." App. 307a; *see* App. 302a-308a. The Ministry's discussion of damages for *ghasb* makes clear that the basic rule is the return of any property usurped, and that there is no compensation for the victim's lost profits or opportunity, because any such award would be speculative and would resemble a forbidden award of interest. App. 311a-313a; *see* App. 308a-318a.

5. ***Proceedings on Appeal.***

a. ***Refusal to Consider the Ministry's Statement.*** SABIC submitted the Ministry's statement to the Delaware Supreme Court for consideration on appeal. App. 99a-103a, 105a-111a; *see* App. 113a-118a, 119a-123a (alternative motion to remand). As confirmed by Saudi Arabia's amicus brief supporting this petition, this document was an official statement of Saudi Arabian law issued by the Ministry in the ordinary course of its official governmental functions. In submitting the statement, SABIC relied on federal authorities holding that an appellate court reviews issues of foreign law *de novo*; is not confined to sources or information considered by the trial court; and, under principles of international comity, owes substantial deference to a foreign sovereign's description of the substance of its own law. App. 100a-102a, 107a-109a; *see* App. 115a-116a. The court refused either to consider the Ministry's statement itself, or to remand the matter to the trial court. App. 61a. It later explained that it viewed SABIC's submission of the statement as "procedurally improper" because the statement "had never been presented to, or considered by, the trial court." App. 15a.

b. ***Affirmance of the* Ghasb *Award.*** Having refused to consider the Ministry's statement, the Delaware Supreme Court affirmed the entire judgment, including the $324 million *ghasb* award. App. 1a-60a. Although it acknowledged that the trial court's determinations of foreign law were subject to *de novo* review (App. 42a), the supreme court indicated that it would "defer[]" to the lower court's "predicate

. . . findings" concerning "the credibility of foreign law experts." App. 42a & n.70.[3] The court sustained the trial court's refusal to distinguish *ghasb* from stealthy or deceptive takings, such as the secret contract breach alleged by ExxonMobil. App. 47a-50a. Having decided to ignore the Ministry's statement, the court held that the lower court's assessment of Saudi law was "entitled to deference, as no basis ha[d] been shown to overturn it." App. 50a.

As to damages, the supreme court focused on statements from Vogel and Wolfson that disgorgement of profits was *theoretically* available in a true case of *ghasb*—while ignoring their agreement that no contemporary Saudi court would award such damages in a case like this one. App. 51a-52a; *see* pp. 7, 9 above. The court endorsed the trial court's conclusion that actual practice in Saudi Arabia was "unverifiable and irrelevant." App. 51a (quoting App. 83a). Again, the court ignored the Saudi Justice Ministry's explanation of Saudi law. The court recognized the substantial anomaly involved in allowing a jury to award special *ghasb* damages without giving it any guidance about the myriad factors a Saudi court would consider in framing such an award, if it considered making it at all. *See* App. 52a-54a. Ultimately, however, the court held that the jury instructions, while "succinct," were good enough to inform the jury that it had discretion in awarding additional damages, and to guide the exercise of that discretion—especially given the trial court's uncertainty about current Saudi law. App. 54a-55a. To the extent the jury's award might be inconsistent with *actual*

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[3] In defending the trial court's procedures (App. 42a-47a), the supreme court misconstrued SABIC's argument to be that neither the trial court nor the experts before it were capable of determining what Saudi law was. *See* App. 46a-47a. It dismissed (*id.*) SABIC's point that neither a U.S. court nor the experts were qualified to derive *novel* principles or applications of Saudi law for themselves, as opposed to predicting how Saudi courts would actually apply established principles.

Saudi law, the court blamed SABIC for bringing its case to an American court in the first place. App. 53a-54a, 60a.[4]

c. ***Denial of Reargument.*** SABIC sought reargument, in part renewing its position that the court violated principles of comity, binding on it as a matter of federal law, when it refused to receive and consider the Saudi government's explanation of pertinent Saudi law. App. 95a-97a. The court denied the motion, among other things clarifying that its "out of hand" refusal to consider the Ministry's statement was based solely on the timing of its submission. App. 91a-92a.

REASONS FOR GRANTING THE PETITION

Although called upon to decide dispositive questions of Saudi Arabian law, the Delaware Supreme Court refused to consider an official Saudi government statement addressing those questions prepared by the Saudi Ministry of Justice. The court then affirmed a $417 million damage award against a Saudi government enterprise, at least $324 million of which is based solely on misinterpretation and misapplication of the Saudi law of *ghasb*. That mistreatment of foreign law and a foreign sovereign by a court in the United States implicates important national interests in foreign policy and foreign commerce, and violates a minimum standard of international comity that binds all courts in the United States as a matter of federal common law.

I. THE DELAWARE SUPREME COURT'S REFUSAL TO CONSIDER THE SAUDI MINISTRY'S STATEMENT CONFLICTS WITH THE RULE APPLIED IN THE FEDERAL AND MOST STATE COURTS

SABIC asked the U.S. courts to settle a dispute with respondents arising out of the parties' dealings under a com-

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[4] The supreme court also affirmed the trial court's rulings on the applicable statute of limitations (App. 15a-23a), several evidentiary issues (App. 23a-28a), a release defense (App. 28a-30a), and issues relating to respondents' breach-of-contract claims (App. 30a-40a). *See* note 5 below.

mercial contract. The dispute is governed by Saudi Arabian law, and SABIC is entitled to have a U.S. court apply that law as it applies in Saudi Arabia itself. *See Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 478 (1912) ("When an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law."); *Whallon* v. *Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) ("Care must be taken to avoid imposing American legal concepts onto another legal culture."). Yet the Delaware Supreme Court affirmed a judgment awarding respondents $324 million in tort-like damages on the basis of legal theories that would never have been accepted by a Saudi court. It could do so only because it refused to consider the Saudi Ministry's official statement explaining the relevant law, and then declared that "no basis ha[d] been shown to overturn" the trial court's rulings, App. 50a.[5] This Court should hold that refusal to consider the Ministry's statement violated federal common law.

A. The Federal Courts And Most States Would Consider An Official Statement Of Foreign Law, Even If Presented For The First Time On Appeal

The application of foreign law in domestic courts has always created "a good deal of difficulty." *Hearings on H.R. 5373 et al. Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 35 (1942). Because of those difficulties, and because of the importance of getting the answers right, for almost 40 years the Federal Rules of Civil Procedure have made clear that the determination of foreign law is a ques-

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[5] While, as noted above (*see* note 2), we use the *ghasb* issues to illustrate the error in refusing to consider the Ministry's statement, the statement also addresses Saudi contract law. It confirms, for example, that in contractual matters "the specific supersedes the general," and a later contract "repeals the former in case of a conflict." App. 321a-322a; *see id.* at 318a-323a. On remand the state court would be required to reconsider the contract issues, as well as the *ghasb* issues, in light of the Ministry's discussion of Saudi law.

tion of law (not a question of fact), and that "the court, in determining foreign law, may consider any relevant material or source." Fed. R. Civ. P. 44.1; *see also* Fed. R. Crim. P. 26.1.

One particularly authoritative source is a foreign sovereign's own explanation of its law. *See United States* v. *McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003) ("Among the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country."), *cert. denied*, 540 U.S. 1177 (2004). More than 60 years ago, for example, this Court recognized a foreign sovereign's official declaration of its own law as "conclusive." *United States* v. *Pink*, 315 U.S. 203, 220-221 (1942). Similarly, the federal courts of appeals have held that a U.S. court must consider—or even defer to—a foreign sovereign's explanation of its own law. *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law."); *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas."); *Access Telecom, Inc.* v. *MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (courts "may defer to foreign government interpretations"); *cf. United States* v. *Mitchell*, 985 F.2d 1275, 1280-1281 (4th Cir. 1993) (describing record including materials from Pakistani government officials, and citing cases that have relied on, among other sources, "affidavits and expert testimony from an Australian federal judge . . . [and] a Peruvian Minister of Agriculture").[6]

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[6] While federal courts of appeals have uniformly received and considered statements from foreign sovereigns, they have differed over what degree of deference is due to such a statement. *Compare Amoco Cadiz*, 954 F.2d at 1312 ("Giving the conclusions of a sovereign nation less re-

Because foreign-law questions are matters of law, a foreign government's statement is valid authority even if it becomes available for the first time on appeal. In *Pink*, for example, this Court gave effect to an official declaration of Soviet law even where it was obtained after trial in a U.S. state court, and was not part of the record on which the State's highest court had rendered its judgment. *See* 315 U.S. at 220-221. Similarly, under federal Rule 44.1, an appellate court reviewing questions of foreign law owes no deference to the trial court's determination. *Finance One Public Co.* v. *Lehman Bros. Special Fin., Inc.*, ___ F.3d ___, 2005 WL 1619852, at *14 (2d Cir. July 12, 2005); *Mobile Marine Sales, Ltd.* v. *M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985); *Kalmich* v. *Bruno*, 553 F.2d 549, 552 (7th Cir. 1977) (court is free to resolve questions of foreign law "on the basis of our own independent research and analysis"). Correspondingly, the appellate court may and should consider any argument, and "any relevant information," on a foreign-law point, regardless of whether it was "available to or considered by" the trial court. *Mobile Marine Sales*, 776 F.2d at 89-90; *see Karaha Bodas*, 313 F.3d at 80; *Access Telecom*, 197 F.3d at 713; *Sidali* v. *INS*, 107 F.3d 191, 197 n.9 (3d Cir. 1997); *Grupo Protexa, S.A.* v. *All Am. Marine Slip*, 20 F.3d 1224, 1239 (3d Cir. 1994); *Mitchell*, 985 F.2d at 1281 (accepting for consideration material first proffered "after the court below had made its determination" of Pakistani law); *Stuart* v. *United States*, 813 F.2d 243, 250-251 (9th Cir. 1987) (declining to consider materials first submitted after argument, but noting that an appellate court "may consider foreign law materials at any time"), *rev'd on other grounds*, 489 U.S. 353 (1989); 9 C. Wright & A. Miller, Federal Practice & Procedure Civil 2d § 2446 (1995) (parties "should be permitted to

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spect than those of a[] [domestic] administrative agency is unacceptable"), *with Karaha Bodas*, 313 F.3d at 92 ("a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference"). This Court has not clearly spoken to the issue. *Cf. Pink*, 315 U.S. at 220 (official statement of Russian law "conclusive").

present new foreign-law materials on appeal").[7] Without question, a federal court would have accepted and considered the Saudi government statement submitted on appeal by SABIC in this case.

Most States likewise appear to treat the substance of foreign law as a question of law, to be determined by courts (including appellate courts) using any relevant material or source.[8] Indeed, some state courts have had specific occasion to consider and respect statements of foreign sovereigns with respect to foreign law. *See In re Estate of Hosova*, 387 P.2d 305, 307-310 (Mont. 1963) (certificates and testimony from Czechoslovakian officials); *In re Estate of Blak*, 150 P.2d 567, 569 (Cal. Dist. Ct. App. 1944) (foreign government evidence "conclusive" as to Netherlands law).

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[7] In *United States* v. *McNab*, 331 F.3d 1228, 1241-1242 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004), a divided panel held in the context of a U.S. criminal prosecution based in part on violation of foreign law that "[w]hen . . . a foreign government *changes* its original position regarding the [substance] of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position." This case, of course, involves no change in the Saudi government's position.

[8] *See* Ala. R. Civ. P. 44.1; Ariz. R. Civ. P. 44.1; Ark. R. Civ. P. 44.1; *see* Cal. Evid. Code §§ 310(b), 452(f), 453; Colo. R. Civ. P. 44.1; Conn. Gen. Stat. § 52-163a; D.C. Super. Ct. Civ. R. 44.1; Ga. Code Ann. § 9-11-43(c); Haw. R. Civ. P. 44.1; Ind. Trial R. P. 44.1(A); Mass. R. Civ. P. 44.1; Me. R. Civ. P. 44A; Mich. Comp. Laws § 600.2114a; Mont. R. Civ. P. 44.1; N.C. R. Civ. P. § 1A-1, Rule 44.1; N.D. R. Civ. P. 44.1; Nev. R. Civ. P. 44.1; N.M. Dist. Ct. R. Civ. P. 1-044(B); N.Y. R. Evid. 4511(b), (c); Ohio Civ. R. 44.1(B); 42 Pa. Cons. Stat. § 5327; R.I. Super. Ct. R. Civ. P. 44.1; S.C. R. Civ. P. 44(d); S.D. Codified Laws § 15-6-44.1; Tex. R. Evid. 203; Utah R. Civ. P. 44(f); Vt. R. Civ. P. 44.1(a); Wash. Super. Ct. Civ. R. 44.1; W. Va. R. Civ. P. 44.1; Wyo. R. Civ. P. 44.1; *see also* Uniform Interstate & Int'l Procedure Act 4.03, 13 U.L.A. 498 (1980). Some states also permit courts to "take judicial notice of . . . . [t]he laws of foreign countries." Alaska R. Evid. 202(c)(4), (d); Fla. Stat. Ann. §§ 90.202(4), 90.203; Idaho R. Civ. P. 44(d); Kan. Stat. § 60-409(b); La. R. Evid. art. 202(B)(f); Miss. Code § 13-1-149; N.J. R. Evid. 201(a), (f); 12 Okla. Stat. § 2201(B)(2); Ore. Rev. Stat. § 40.090(6); Tenn. R. Evid. 202; Va. Code Ann. § 8.01-386.

B. Delaware Has Joined The Minority Of States That Apply A More Restrictive Rule

On its face, Delaware law also appears to treat the determination of foreign law as a question of law. *See* Del. R. Evid. 202(e) *and* Del. Super. Ct. R. Civ. P. 44.1 (reproduced above at p. 3). In this case, however, the Delaware Supreme Court has made clear that, unlike the federal courts or most other state courts, it will not accept or consider even highly relevant authority about the meaning of foreign law—a statement from the very sovereign whose law is in question—if it is made available for the first time on appeal.

With that holding, Delaware joins a handful of States that restrict the provision of new authority concerning foreign law on appeal.[9] In at least one case, another State similarly refused even to consider an official advisory opinion rendered by a foreign supreme court.[10]

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[9] *See* Minn. R. Evid. 201; Minn. Stat. §§ 599.01 *et seq.*; *Nessi* v. *Sudovest Group, Inc.*, Nos. A04-1461 & A04-1465, 2005 WL 832199, at *4 (Minn. Ct. App. Apr. 12, 2005) (foreign law is "a question of fact that must be proved like any other fact"); *Bianchi* v. *Savino Del Bene Int'l Freight Forwarders, Inc.*, 770 N.E.2d 684, 695 (Ill. App. Ct. 2002) ("[I]n Illinois, the laws of foreign countries must be pled and proven as any other fact."); *id.* at 698-701 (rejecting federal and Hawaii rules and refusing to consider foreign-law materials "outside the certified record"); *Ahumada* v. *Dow Chem. Co.*, 992 S.W.2d 555, 559 n.3 (Tex. App. 1999) (refusing, notwithstanding Tex. R. Evid. 203, "to consider all [foreign law] materials not presented to the trial court in the summary judgment proceedings"); *Panama Processes, S.A.* v. *Cities Serv. Co.*, 796 P.2d 276, 294-295 & n.82 (Okla. 1990) (noting advisory committee's observation that foreign law is treated as a fact issue on review and contrasting federal Rule 44.1); Iowa Code § 622.61 ("The unwritten laws of any other state or government may be proved as facts . . ."); *National Equip. Rental, Ltd.* v. *Estherville Ford, Inc.*, 313 N.W.2d 538, 547-548 (Iowa 1981) (in case involving another State's law, noting "general rule" in Iowa that "foreign law . . . is a fact").

[10] *See* White, *Foreign Law, Politics and Litigants in U.S. Courts: A Discussion of Issues Raised by* Transportes Aereos Nacionales, S.A. *v.* De Brenes, 27 U. Miami Inter-Am. L. Rev. 161 (1995) (discussing *Transportes Aeros Nacionales S.A.* v. *de Brenes*, 625 So. 2d 4 (Fla. Dist. Ct. App. 1993), *rev. denied*, 632 So. 2d 1025 (Fla. 1994), *cert. denied*, 512 U.S. 1222 (1994)).

In refusing to consider the Saudi Ministry's statement, the Delaware Supreme Court flatly rejected SABIC's reliance on federal authority and principles of international comity. App. 15a, 91a-92a. This case therefore squarely presents the question whether federal common law requires appellate courts in the United States—state or federal—to receive and consider a foreign sovereign's statement explaining the substance of its own law.

II. FEDERAL COMMON LAW BASED ON PRINCIPLES OF INTERNATIONAL COMITY REQUIRES ANY U.S. COURT, STATE OR FEDERAL, TO RECEIVE AND CONSIDER AN OFFICIAL STATEMENT FROM A FOREIGN SOVEREIGN EXPLAINING THE SUBSTANCE OF THAT SOVEREIGN'S LAW

Comity is the "recognition which one nation allows in its territory to the legislative, executive, or judicial acts of another nation." *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895). It serves both to "promote justice between individuals" and "to produce a friendly intercourse between the sovereignties to which they belong." *Id.* at 165. Principles of international comity are a prime example of interstitial federal common law, formulated and applied by the courts "in the absence of a contrary congressional direction." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959); *see Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002) ("[T]he federal judiciary has relied on principles of comity and international law to protect foreign governments in the American legal system."); *In re Maxwell Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

A. Principles Of International Comity Bind Both Federal And State Courts To Consider And Respect The Interests Of Foreign Sovereigns

This Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Société Nationale Industrielle Aérospatiale* v. *District Ct.*, 482 U.S. 522, 546 (1987). For example, in *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) (mem.), this Court

embraced, "as a matter of grace and comity on the part of the United States," the immunity of a foreign sovereign from suit in United States courts. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Conversely, short of war or some positive intervention by the political branches, comity also holds all U.S. courts open to foreign sovereigns, even those with which the Nation may have difficult relations. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 409 (1964). In litigation involving foreign parties, the Court has invoked comity in requiring that both state and federal courts "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality," and for "any sovereign interest expressed by a foreign state." *Société Nationale*, 482 U.S. at 546. Similarly, in resolving questions of personal jurisdiction, both state and federal courts must take proper account of "the procedural and substantive policies of other nations whose interests are affected." *Asahi Metal Indus. Co.* v. *Superior Ct.*, 480 U.S. 102, 115 (1987).

Where principles of international comity apply as a matter of federal law, they provide "a principle of decision binding on federal and state courts alike." *Sabbatino*, 376 U.S. at 427. Judicial actions implicating international comity by definition implicate foreign relations; and there is "no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25); *see also, e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968) (invalidating substantive state law where its enforcement by state courts could "disturb foreign relations").[11] The definition and enforcement of

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[11] There is no question that "complete power over international affairs is in the national government," and "is not and cannot be subject to

what comity requires is accordingly one of those "few areas involving 'uniquely federal interests'" that are "so committed by the Constitution and laws of the United States to federal control" that federal law must supply the rules of decision. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); *see also, e.g., Texas Indus.*, 451 U.S. at 641 (federal law governs "international disputes implicating . . . our relations with foreign nations"); *Sabbatino*, 376 U.S. at 425 (issues implicating "our relationships with other members of the international community must be treated exclusively as an aspect of federal law").

B. Federal Common Law Requires Any U.S. Court To Give Respectful Consideration To A Foreign Sovereign's Official Statement Of Its Law

It is these principles of comity that the federal courts of appeals have invoked in concluding that a U.S. court must, at a minimum, respectfully consider the statement of a foreign government regarding the meaning of that government's laws. *See, e.g., Karaha Bodas*, 313 F.3d at 92 (quoting *Société Nationale*, 482 U.S. at 546); *cf. Jota* v. *Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) ("[I]nherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions of the foreign state taken within or with respect to its own territory."). Those decisions ultimately rest on principles of federal common law that are equally binding on the courts of Delaware. Courts—state and federal—must be scrupulous in their extension of comity because "'[e]xperience has shown that international controver-

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any curtailment or interference on the part of the several states." *United States* v. *Belmont*, 301 U.S. 324, 331 (1937); *see also, e.g., Zschernig*, 389 U.S. at 436 ("international relations" is a "matter[] which the Constitution entrusts solely to the Federal Government"); *Pink*, 315 U.S. at 233 ("[p]ower over external affairs is not shared by the States," but is "vested in the national government exclusively").

sies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" *Zschernig*, 389 U.S. at 440 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1941)).

In this case, the federal foreign affairs interest created by the submission of a foreign sovereign's official views with respect to dispositive questions of foreign law is reinforced by three additional factors. First, one of the parties to the underlying dispute is itself an instrumentality of a foreign sovereign. Second, the dispute arises out of an international commercial transaction. Third, essentially all the conduct involved in that transaction took place entirely within the Kingdom of Saudi Arabia. Here, therefore, federal primacy in foreign affairs is both directly engaged and allied with federal primacy in regulating foreign commerce—and if there is any balancing of sovereign interests, here the balance tips decidedly in favor of respect for the foreign sovereign. *See Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (suit against partially state-owned Peruvian mining company implicated important foreign policy concerns under federal common law); *see also Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing "strong [federal] presumption in favor of enforcement of . . . choice of forum provisions" in international commercial contracts, even if those provisions might be unenforceable in a purely domestic dispute); *cf. M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) ("elimination of . . . uncertainties . . . is an indispensable element in international trade").

Where an issue is thus uniquely federal, "[i]n the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). And where such federal common law controls, "no State can undermine the federal interest . . . even if it deals with private parties." *Sabbatino*, 376 U.S. at 427. For example, before enactment of the Foreign Sover-

eign Immunities Act in 1976, the extension of immunity to foreign sovereigns by both federal and state courts became "part of the fabric of [U.S.] law . . . solely through the adjudications of this Court." *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955). State courts followed the federal immunity rules established by this Court, including deferring to decisions by the Department of State regarding a foreign sovereign's immunity from suit. *See, e.g.*, *United Mexican States* v. *Ashley*, 556 S.W.2d 784, 785-786 (Tex. 1977); *F.W. Stone Eng'g Co.* v. *Petroleos Mexicanos*, 42 A.2d 57, 59-60 (Pa. 1945); *United States of Mexico* v. *Schmuck*, 56 N.E.2d 577, 580-581 (N.Y. 1944).

Here, requiring that a court receive and consider a statement by a foreign sovereign explaining its own law is necessary both to enable courts to reach correct results and to avoid offense to the foreign nations whose laws our courts are purporting to apply. *Cf. Pink*, 315 U.S. at 232 ("The nation as a whole would be held to answer if a State created difficulties with a foreign power."). That basic safeguard should not be left to "divergent and perhaps parochial state interpretations." *Sabbatino*, 376 U.S. at 425; *see Texas Indus.*, 451 U.S. at 641 (federal rule of decision applies where the "international nature of the controversy makes it inappropriate for state law to control"); *cf.* Jessup, *The Doctrine of* Erie Railroad *v.* Tompkins *Applied to International Law*, 33 Am. J. Int'l L. 740, 743 (1939) ("It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."). This Court should make clear that the obligations of all U.S. courts in such situations are governed by federal common law.

III. THE NEED FOR A GOVERNING FEDERAL RULE OF COMITY WARRANTS REVIEW IN THIS CASE

The Delaware Supreme Court's "out of hand" refusal to consider the Saudi Ministry's statement (App. 92a) asserts a power rooted in state law to ignore the formally expressed views of a foreign sovereign concerning its own law, if those views are expressed after an initial ruling in the trial court.

As we have explained, the court's decision conflicts with the rule prevailing in the federal and most state courts, and contravenes what should be a clear rule of federal common law. The matter warrants review in this case.

A. The Delaware Supreme Court's Refusal To Consider The Saudi Ministry's Statement Led It To Affirm A Judgment That Is Fundamentally Unreliable As A Matter Of Saudi Law

First, the state supreme court's decision not to consider the Ministry's statement led it to affirm erroneous rulings of foreign law that provide the sole support for an award of $324,000,000 in damages against an instrumentality of a friendly foreign sovereign.

As explained above (at 7-9), two of the experts who testified in the trial court—including the court's independent expert—agreed that in contemporary Saudi practice one characteristic of *ghasb* is some element of openness: a lack of stealth on the part of the wrongdoer, or some corresponding knowledge of being wronged on the part of the victim. Respondents' expert, on the other hand, had never been to Saudi Arabia, and did not purport to have studied modern Saudi practice. 3/7/03 AM Tr. 15:2-21 (Hallaq). Indeed, he specifically denied the relevance of any such study. *See* Del. S. Ct. App. A530-A533 (Hallaq Dep.).

The trial court recognized the importance of actual practice, but it despaired of being able to ascertain what that practice was. *See* pp. 10-11, above. It therefore fell back on what it understood to be the textual definitions from authoritative scholars. Even on the trial court record, the weight of the expert testimony established that both the Hanbali scholars and modern practice distinguish *ghasb* from surreptitious or deceptive takings—the only sort of "taking" that respondents alleged here. *See* App. 160a-161a, 243a-244a (Vogel); 190a-191a, 193a-195a, 221a-223a (Wolfson). The Saudi Ministry's statement confirms that fundamental point. App. 304a-305a, 307a. Had the state supreme court considered and applied the Ministry's statement, it could not have affirmed the *ghasb* judgment.

Likewise, the trial court erred in allowing the jury to award damages supposedly based on the profits SABIC might have made by using, in its general business, money wrongfully "taken" from respondents over a span of 20 years. Professor Vogel explained that Saudi law treats money "very differently [from] other property in many ways due to the intense preoccupation with avoiding prohibited interest and usury" (App. 163a), and that Saudi judges universally refuse to award damages for a victim's lost profits on the grounds that they are both interest-like and impermissibly speculative (App. 163a-164a, 248a-251a, 282a-284a). Accordingly, in the context of a commercial dispute like this one, Saudi judges would almost certainly "exercise any discretion they possess ... against giving damages on money judgments, even damages premised on disgorgement of profits gained from the use of money improperly taken or withheld." App. 249a. After visiting Saudi Arabia for the specific purpose of researching the damages issue, the court's own expert concluded that Professor Vogel's analysis was "absolutely correct." App. 224a; *see also* App. 232a (award above amount "usurped" would be unlikely "absent unusual facts and compelling circumstances"); 234a ("[I]n practice a Saudi Arabian judge is unlikely to award compensation in excess of the principal value of the property taken."); Del. S. Ct. App. A545-A546, A2717-A2718 (Wolfson Dep.).

Despite this agreement between two of the Saudi law experts—one of whom was independent of either party—the trial court allowed the jury to award "profits" damages. It refused even to give an instruction, based on the words of its own independent expert, that such damages could be awarded only in "unusual and compelling circumstances." Del. S. Ct. App. A2587 (proposed instruction); *see* App. 232a. The Delaware Supreme Court affirmed those decisions as consistent with Saudi law. It could not have done so if it had deigned to consider the Saudi Justice Ministry's extensive discussion of the applicable law—which stresses that an injured party "should not take more than what he lost," and

that proper damages do not include either interest or "what is called compensation for lost opportunity." App. 310a-311a.

If the Delaware Supreme Court had considered the Saudi Ministry's explanation of Saudi law, it could have corrected these critical errors in the ordinary appellate course. The court's refusal to consider the statement led it instead to affirm a judgment that is fundamentally unreliable as what it purports to be: an application of Saudi Arabian law.

The Kingdom of Saudi Arabia appears as an amicus in this Court, reiterating in the clearest terms that the judgment below is inconsistent with Saudi law. The Kingdom's brief also underscores the offense caused to the Kingdom not only by the substance of the judgment, but by the state supreme court's cavalier refusal even to consider the Ministry's statement. This Court should grant review to make clear that the state court's actions were improper as a matter of U.S. national law.[12]

B. Global Economic And Political Interdependence Require That All U.S. Courts Show Appropriate Respect For Foreign Sovereigns When Purporting To Apply Those Sovereigns' Laws

Beyond the immediate significance of the judgment below to SABIC and to Saudi Arabia, it is important for this Court to provide clear guidance to all U.S. courts concerning

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[12] Should the court have any question concerning the foreign policy implications of this case, it may wish to seek the views of the Executive Branch. Alternatively, we note that in the decision below the Delaware Supreme Court expressed some uncertainty about the authenticity or authority of the Ministry's statement. If there was ever any basis for such a concern, the Kingdom's brief in this Court has now removed it. Under these circumstances, the Court may wish to give the state supreme court an opportunity to rectify its own error by granting the petition, vacating the decision below, and remanding the case for reconsideration in light of the views expressed by the Kingdom of Saudi Arabia, both in the Ministry's statement and in the Kingdom's amicus brief, with respect to the substance of Saudi law.

their obligations to apply principles of international comity as a matter of federal common law.

Commercial transactions and relationships continue to become more international. They now commonly involve parties, physical operations, contractual relationships, and intellectual property located in or governed by the laws of many different countries. Courts in the United States will increasingly be called on to adjudicate disputes governed in whole or in part by the laws of other nations. As they do so, some basic norms must be observed so that the fairness and accuracy of all U.S. courts will exemplify the standard that the United States, in turn, will likewise properly demand from courts abroad that are called upon to enforce rights or obligations under U.S. law. *Cf. General Elec. Co.* v. *Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001) (deference to "rulings of foreign tribunals [fosters] international cooperation and encourages reciprocity," which are "worthy goals of comity"); *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992) (issuance of antisuit injunctions against foreign legal proceedings invites foreign tribunals "to reciprocate such disrespect" against American courts).

Those norms generally include fidelity to the substance of foreign law—even, or perhaps especially, when it differs from our own. *See, e.g., Cuba R.R.*, 222 U.S. at 480 ("The only just ground for complaint would be if [the parties'] rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."). As this case demonstrates, achieving that fidelity can be difficult. *See also, e.g., Bridas Corp.* v. *Unocal Corp.*, 16 S.W.3d 893, 903 (Tex. App. 2000) (applying law of Afghanistan, which relies on neither "government legislation nor judicial precedent"). Moreover, U.S. courts' interpretations of foreign law will tend to replicate themselves in our common-law system—further emphasizing the need for accuracy in initial adjudications. *See Mitchell*, 985 F.2d at 1280 (noting the government's reliance on "a Fifth Circuit opinion that had previously addressed the [Pakistani] Import and Export law"); Sprankling & Lanyi, *Pleading and Proof of*

Foreign Law in American Courts, 19 Stan. J. Int'l L. 3, 65-66 (1983). Under these circumstances, neither U.S. courts nor the parties that rely upon them can afford to apply a rule under which a court refuses to consider a statement from a foreign sovereign, explaining the very law the court is struggling to apply. To the contrary, common sense suggests that U.S. courts should receive such statements—as, indeed, the federal and most state courts already do.

In this case, the Supreme Court of Delaware held that a court may ignore a foreign sovereign's statement explaining its own law if the statement becomes available for the first time on appeal. That result cannot be reconciled with the rule applied in other courts, with the demands of accuracy, or with the respect that all our courts owe to foreign nations. This Court should grant review and hold that comity requires judicial consideration of sovereign statements as a uniform rule of federal common law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2005

APPENDICES

APPENDIX A

SUPREME COURT OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION
PLAINTIFF BELOW, APPELLANT,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
-and-
EXXON CHEMICAL ARABIA, INC.
DEFENDANTS BELOW, APPELEES.

No. 493,2003

Submitted: June 1, 2004
Decided: January 14, 2005

[866 A.2d 1]

Before STEELE, Chief Justice, HOLLAND, BERGER and JACOBS, Justices, and STRINE, Vice Chancellor,[1] constituting the Court en Banc.

JACOBS, Justice.

Saudi Basic Industries Corporation ("SABIC"), the counterclaim defendant below, appeals from a $416.8 million Superior Court judgment entered against SABIC and in favor of SABIC's joint venture partners, Mobil Yanbu Petroleum Company ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon").[2] SABIC brought this action in the Superior

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[1] Sitting by designation pursuant to Art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

[2] Except where the context otherwise requires, Mobil and Exxon, the two counterclaim plaintiffs below, are referred to collectively as "ExxonMobil." Although Exxon's and Mobil's respective parents merged

Court of Delaware, seeking a declaratory judgment that any payments made to SABIC by the joint venture partnerships were not overcharges that violated any applicable contract. In response, Mobil and Exxon asserted counterclaims in [7] tort [3] and for breach of contract, alleging that for over two decades, SABIC had secretly overcharged the partnerships for technology that SABIC had licensed from Union Carbide Corporation. After a two-week trial, the jury found that SABIC had breached the joint venture agreements and had also committed the Saudi tort of usurpation against both Mobil and Exxon. Based on those findings, the jury awarded compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon.

On this appeal, SABIC contends that the judgment should be reversed and/or that the case should be remanded for a new trial, because the trial judge made numerous rulings, both substantive and evidentiary, that were erroneous as a matter of law. Having considered in depth the parties' briefs and the extensive record, we conclude that none of SABIC's multitudinous claims of error has merit and that the judgment of the Superior Court should be affirmed.

FACTS

The facts that are pertinent to this appeal are either undisputed or, where disputed, are based upon reasonable inferences from the record evidence that, viewed in the light most favorable to the prevailing parties, raise issues of material fact that the jury could justifiably have resolved in ExxonMobil's favor.[4]

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in 1999 to form ExxonMobil, they were separate companies and competitors at the time that most of the critical events in this lawsuit took place.

[3] As discussed more fully herein, ExxonMobil's tort claim was based upon the Saudi Arabian tort of *ghasb* (usurpation).

[4] The facts recited in this Opinion are shaped by the applicable standard of review. SABIC claims on appeal, among other things, that the trial court erroneously denied SABIC's motion for judgment as a matter of law. This Court reviews the denial of such a motion to determine

1. Formation of the Joint Venture Partnerships

SABIC is a Saudi Arabian corporation that originally was 100% owned (and now is 70% owned) by the Saudi government. SABIC was formed in the late 1970s to work jointly with several firms to use petroleum-based feedstocks in manufacturing polyethelene, which is a type of plastic. During the mid-to-late 1970s, in order to diversify Saudi Arabia's industrial base, SABIC began exploring the possibility of forming joint ventures to manufacture polyethylene. The result was the formation of two separate 50-50 joint ventures, one between SABIC and Mobil (the "Yanpet joint venture"), and the other between SABIC and Exxon (the "Kemya joint venture"). The Yanpet joint venture was formed by an agreement SABIC and Mobil entered into on April 19, 1980; the agreement for the Kemya joint venture was entered into between SABIC and Exxon on April 26, 1980. Both joint ventures had the same ultimate purpose: to manufacture polyethelene in Saudi Arabia.

A critical, carefully negotiated premise of both joint ventures was that the profits enjoyed by each joint venture partner would be limited to the profits earned by the joint venture. As a result, no partner would profit at the joint venture's expense. Consistent with that principle, the joint venture agreements forbade any partner [8] from charging a "mark-up" on technology procured from a third party and sublicensed to the joint venture. Thus, Article 6.3 of the Yanpet joint venture agreement provided:

"'whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury.' In other words, we will not disturb a Superior Court ruling denying a motion for judgment as a matter of law where 'under any reasonable view of the evidence the jury could have justifiably found for [the non-moving party].'" *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998) (internal citations omitted); *accord, Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1036 (Del. 2003).

> To the extent either Partner or any Affiliate thereof procures patents, processes and other licensing rights of third parties, and sublicenses such rights to the partnership, it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.

And, Article 6.3 of the Kemya joint venture agreement, which was to the same effect, provided that:

> Patents, processes, and other licensing rights of third parties which require the payment of royalties, rentals and other remuneration to such third parties shall be paid by the Partnership against appropriate invoices. To the extent either Partner or any Affiliate thereof procure such rights and sublicenses for the Partnership, it shall not receive any remuneration other than actual cost disbursed in acquiring such license.

2. SABIC Secretly Overcharges The Yanpet And Kemya Joint Ventures

In order to manufacture polyethylene, Yanpet (the SABIC/Mobil joint venture partnership) needed technology that it did not own. Initially, the parties intended that Yanpet would license Unipol® PE technology directly from Union Carbide Corporation ("UCC"). After a Spring 1980 meeting in Riyadh, Saudi Arabia, however, SABIC informed its partner, Mobil, that SABIC itself would license the technology directly from UCC and then sublicense it to Yanpet. Consistent with Article 6.3, SABIC assured Mobil that SABIC would pass through to Yanpet at its cost, "dollar for dollar," the amounts SABIC paid to UCC for Yanpet's use of the Unipol® PE technology. In fact, however, SABIC intended to furnish the technology to Yanpet at a mark-up above SABIC's cost.

In September 1980, SABIC and UCC executed an agreement granting SABIC an exclusive license to the Unipol® PE technology within the Kingdom of Saudi Arabia (the "SABIC/UCC License Agreement"). Neither Mobil nor

Yanpet was permitted to attend any of the meetings between SABIC and UCC at which the financial terms of the SABIC/UCC License Agreement were discussed. That did not concern Mobil, because having been assured that SABIC would be providing Yanpet the same terms that SABIC itself had procured from UCC, Mobil and Yanpet did not negotiate, or even comment upon, the financial terms of the sublicense. Ultimately, SABIC and Yanpet executed the SABIC-Yanpet Unipol® PE Technology License Agreement, which was dated effective October 15, 1980.

Over the following two decades, SABIC charged Yanpet sublicense fees and royalties that were substantially higher than what SABIC was paying to UCC under the SABIC/UCC License Agreement.[5] Because SABIC never told Mobil that it had marked up the sublicense fees and royalties, Mobil believed, during that entire time, that SABIC's license royalties were being passed through to Yanpet at cost.

The negotiation of and performance under the sublicense agreement between SABIC and Kemya (the SABIC-Exxon joint venture partnership) mirrored the Mobil/[9] Yanpet fact pattern. Originally, SABIC and Exxon planned for Kemya to use Exxon's own proprietary technology to manufacture polyethylene. Later, they understood that instead, Exxon would acquire the right to use UCC's Unipol® PE technology, and would then grant a Unipol® PE license to Kemya, as sublicensee.

Ultimately, however, as with Yanpet, SABIC informed Exxon, in a March 1980 meeting in Riyadh, that it (SABIC) would license that technology directly from UCC, and then sublicense the technology to Kemya. Like Mobil, Exxon was excluded from the negotiations over the financial terms of the SABIC/UCC license. That did not concern Exxon be-

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[5] There is evidence that SABIC's motive for the surreptitious overcharges was to create a "cushion" for itself in case the joint ventures failed. SABIC accounted for the mark-up in its own internal accounting documents as its "profit" or "net gain."

cause Mr. Ibrahim Bin Salamah, SABIC's chief negotiator for the Kemya and Yanpet Joint Venture Agreements and also for the Kemya and Yanpet Unipol® PE/UCC technology sublicenses, assured Exxon's representative that SABIC was "not interested in profiting on the technology passed on to its [joint ventures]."

In fact, however, SABIC never intended to limit its royalty charges to Kemya to the amount(s) that SABIC would be paying to UCC. As with Yanpet, SABIC had determined to charge a marked-up royalty to Kemya. Following the same pattern that it employed with Yanpet, SABIC overcharged Kemya for its use of the Unipol® PE technology, to create a "cushion" in case the ventures failed. SABIC accounted for the overcharges as a "profit" in its internal financial records.

In June 1987, because of poor market conditions in the polyethylene business, UCC agreed to reduce the royalties due from its licensees, including SABIC. Correspondingly, the joint venture partners amended the Yanpet and Kemya sublicenses to reduce the royalties payable by the joint venture partnerships to SABIC. Unbeknownst to ExxonMobil, however, SABIC had negotiated for itself a royalty rate reduction that was significantly larger than the reduction SABIC had granted to the joint ventures. Exxon and Mobil representatives testified that SABIC never told Mobil, Yanpet, Exxon or Kemya that it had extracted a reduction in the cost of Unipol® PE technology that was much larger than the reduction SABIC had extended to Yanpet and Kemya. SABIC's concealment of the discrepancy between those royalty reductions—which had the effect of increasing SABIC's reserves—was intentional.

Not until the year 2000 did ExxonMobil discover the overcharge. That occurred as a result of a dispute between SABIC and the Saudi taxing authority relating to the royalties paid by SABIC to UCC under the SABIC/UCC Agreement. The Saudi taxing authority determined that those payments were taxable. That decision prompted SABIC to send letters to Kemya and Yanpet informing them of the tax

dispute and demanding that the partnerships pay a share of the tax to SABIC. While attempting to determine the accuracy of SABIC's indemnification demand, ExxonMobil discovered, for the first time,[6] [10] that SABIC had overcharged the partnerships for furnishing the UCC's Unipol® PE technology.

3. The Procedural History Of The Litigation

To aid an understanding of the issues presented by SABIC's arguments, it is helpful first to summarize the procedural history of the litigation, including the trial court rulings that are challenged on this appeal.

a. The New Jersey Federal Action

The claims at issue first surfaced in litigation brought by SABIC against ExxonMobil in the United States District Court for the District of New Jersey. In that court, SABIC sought a declaratory judgment that ExxonMobil had used technology, previously developed for Kemya, to obtain pro-

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[6] In support of its argument that ExxonMobil had waived their overcharge claims and that, in any event, the claims were barred by the statute of limitations, SABIC points to testimony of Richard Todd, a Kemya secondee, speculating about a possible difference between the amounts paid by Kemya and amounts paid by SABIC. Todd conceded, however, that he had no actual evidence of any differential, that he did not know whether there was, in fact, any difference, and that he was unaware of any assurances by SABIC to Exxon and Kemya that there would be no markup.

In an effort to establish its defense of waiver or, alternatively, that ExxonMobil had been on inquiry notice of its claims for statute of limitations purposes, SABIC also cites two June 1994 form letters, sent separately by SABIC to Yanpet and Kemya, that inadvertently attached a June 10, 1994 statement from UCC to SABIC. There is no evidence that anyone at Mobil ever saw that document or that anyone at Yanpet ever told Mobil about it. Nor did Kemya know what the document meant, because the UCC document addressed several joint ventures and the numbers relating to each were different. When Kemya asked SABIC about the document, SABIC reassured Kemya that the sublicense was a passthrough and that there were no overcharges. As a result of, and in reliance upon, that representation, Exxon and Kemya made no further inquiry about this issue.

prietary information (including patent and trade secrets) in violation of ExxonMobil's service agreement with Kemya. SABIC sought a declaratory judgment that Kemya owned the patents, and also sought an injunction directing ExxonMobil to transfer legal title to those patents to Kemya.[7] ExxonMobil raised the defense of unclean hands against SABIC's claim, contending that SABIC had wrongfully overcharged Kemya for the royalty payments at issue here.[8] During the discovery stage, SABIC agreed to a consent order that would have required SABIC to respond to discovery regarding the overcharge claims. But SABIC did not comply with that order. Instead, it filed the Delaware Superior Court action that is the subject of this appeal.[9]

b. The Delaware Superior Court Action

In its Superior Court action, SABIC sought a declaratory judgment that Kemya's and Yanpet's royalty payments to SABIC were not overcharges that violated any applicable contract. In response, ExxonMobil interposed counterclaims for damages, based upon SABIC's alleged breaches of the joint venture agreements, breaches of fiduciary duty and upon the implied duty of good faith, and the doctrines of unjust enrichment and promissory estoppel. ExxonMobil also demanded a jury trial, to which SABIC made no objection until only weeks before the trial, when SABIC moved (unsuccessfully) to strike the jury trial demand.

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[7] *Saudi Basic Indus. Corp v. ExxonMobil Corp.*, 194 F.Supp.2d 378, 384 (D.N.J. 2002), *vacated in part and remanded in part*, 364 F.3d 102 (3rd Cir. 2004), *cert. granted*,---- U.S. ----, 125 S.Ct. 310, 160 L.Ed.2d 221 (2004).

[8] *Id.* Shortly after SABIC filed the Superior Court action, ExxonMobil filed a separate action against SABIC in the New Jersey federal court to recover the royalty overcharges. SABIC moved to dismiss that second action, claiming that, as a "foreign state," it was immunized from being sued in the United States under the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 et. seq. ("FSIA"). The New Jersey District Court held that by filing suit in New Jersey, SABIC had waived any FSIA immunity as to the overcharge claims. *See* 194 F. Supp. 2d at 401, 403.

[9] *Id.*, 194 F. Supp. 2d at 413-414, n. 15.

[11] On March 21, 2003, at the conclusion of a two week trial, the jury returned a verdict awarding compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon. The jury found that SABIC had breached Article 6.3 of both the Yanpet and Kemya joint venture agreements, and also that SABIC had committed the Saudi tort of usurpation ("*ghasb*") against both Mobil and Exxon.

SABIC claims on this appeal that that jury verdict must be set aside because it was the product of multitudinous rulings, all erroneous as a matter of law, made by the trial judge during the course of the Superior Court action. The rulings that are contested on this appeal fall into five separate groupings. To better understand SABIC's claims on appeal, and our analysis of those claims, the contested rulings are briefly summarized at this point.

(1) The Statute of Limitations Rulings

Before trial, SABIC moved for summary judgment on the ground that ExxonMobil's claims were barred by Delaware's three-year statute of limitations. The trial court denied that motion, holding as a matter of law that (1) under substantive principles of Saudi law (which both sides agree is applicable), ExxonMobil's claims were property rights that could not be barred by the passage of time; and (2) Delaware's borrowing statute (which would have subjected ExxonMobil's claims to the three year limitations period) was inapplicable.[10] The trial court later denied SABIC's post-trial motion for judgment as a matter of law or, alternatively, for a new trial, holding that the court had previously determined, as a matter of law, that the Delaware three year statute of limitations did not bar ExxonMobil's claims.[11]

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[10] Bench Ruling, C.A. No. 000-07-161, Feb. 10, 2003 (Appellant's Opening Br. at R4-8).

[11] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. et al.*, C.A. No. 000-07-161, 2003 WL 22016813 (Del. Super. Aug. 26, 2003).

(2) The Evidentiary Rulings

Both before and during the trial, the Superior Court made evidentiary rulings. Four of those rulings are contested on this appeal and are next described.

(a) the exclusion of certain testimony by Ibrahim Bin Salamah–proffered by SABIC long after the discovery cutoff date and shortly before trial–that contradicted the prior testimony of Bin Salamah and of another SABIC witness, as well as SABIC's formal admissions that SABIC intended to charge a marked-up royalty to Yanpet and Kemya but never disclosed that intent to its partners;

(b) the admission of an internal memorandum authored by Exxon employee, John Webb, reflecting representations by Mr. Bin Salamah in 1986, that the royalty rates paid by SABIC to UCC for its Unipol® PE license were the same as the royalty rates being paid by ExxonMobil as sublicensees of SABIC;

(c) the admission of testimony of Exxon employee George Fitzpatrick, and of Mobil employee Robert Murphy, that SABIC had promised ExxonMobil a "pass through" license, and later represented that it (SABIC) had "passed through" its billings to Kemya and Yanpet at SABIC's cost; and

(d) the limitation of the scope of evidence (proffered by SABIC) of Exxon's subjective intent relating to drafts of agreements that predated the joint venture, and that were never executed, in connection with ExxonMobil's possibly providing polyethene technology to the [12] joint ventures.[12]

(3) The Rulings On SABIC's Defense of Release

One of SABIC's defenses to ExxonMobil's counterclaims was that the 1987 Letter Agreements, wherein ExxonMobil and SABIC renegotiated the joint ventures license fees, operated to release all payment-related claims

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[12] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 at *2-*5, *8-*9 (Del. Super. Sept. 2, 2003).

that ExxonMobil could have brought against SABIC. The trial court granted judgment as a matter of law to ExxonMobil on that release defense on three separate grounds: (i) neither Exxon nor Mobil had signed the 1987 Letter Agreements; (ii) the unambiguous language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and (iii) the only evidence as to the relevant Saudi law was the unrebutted testimony of Professor Wael B. Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. After the jury verdict, SABIC renewed its motion for judgment as a matter of law, based on the same release defense that the trial judge had previously rejected. The Superior Court denied that motion by order dated August 27, 2003.[13]

(4) The Rulings on ExxonMobil's Claims For Breach of Contract

At the conclusion of the trial, the jury found that SABIC was liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements, which (the jury found) was controlling and required SABIC to limit its royalty charges for providing Unipol® PE technology to the partnerships to a "pass through" of SABIC's own cost of licensing that same technology from UCC. After the close of the evidence, SABIC moved for judgment as a matter of law on those contract claims. The trial court denied that motion.

After the jury verdict, SABIC renewed its motion for judgment as a matter of law or, alternatively, a new trial.[14] The basis of the renewed motion for judgment was that as a matter of law no reasonable jury could have found for ExxonMobil on their contract claims. The thrust of SABIC's alternative motion for a new trial was that the great weight

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[13] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 at 5 (Del. Super. Aug. 27, 2003).

[14] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 (Del. Super. Aug. 27, 2003)

of the evidence established that the 1980 Unipol® PE licenses had superseded and/or modified the joint venture agreements.[15]

The trial court denied both motions, holding that: (a) a reasonable jury could have found that Article 6.3 (which required a cost pass through) governed the terms under which SABIC could sublicense the Unipol® PE technology to the joint ventures; and (b) the record dispositively negated SABIC's contention that specific joint venture polyethylene licenses entered into in October and November 1980 had superseded or "trumped" Article 6.3 of the joint venture agreements, because Exxon and Mobil did not sign the sublicenses, and did not understand or intend that the sublicenses would operate to supersede Article 6.3.[16]

[13]*(5) The Rulings on ExxonMobil's Tort Claims for "Usurpation"*

The jury also found SABIC liable to ExxonMobil for committing the tort known under Saudi law as usurpation (*ghasb*). The amount of the jury award for usurpation was $416 million, of which $92 million represented Exxon's and Mobil's pro rata share of the amounts that (the jury found) SABIC had overcharged for the Unipol® PE technology, and $324 million represented those parties' pro rata share of the profits that SABIC had earned through its use of the overcharges in its business operations.

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[15] *Id.* at [1].

[16] SABIC's defense that Article 6.3 was superseded by the sublicenses was stricken by the Superior Court. On appeal, SABIC contends that it is entitled, at the very least, to a new trial at which that defense could be presented to the jury.

The Superior Court also rejected SABIC's contention that ExxonMobil had abandoned their contract claims, concluding that "this particular argument borders on frivolous and [that] . . . the record establishes, unequivocally, that ExxonMobil asserted, and continued to vigorously assert, its breach of contract claim and never stopped litigating this claim." 2003 WL 22048236 at 1. SABIC has not appealed that ruling.

Following the jury verdict, SABIC filed two separate motions for judgment as a matter of law or, alternatively, a new trial or remittitur on ExxonMobil's *ghasb* claims. In its first motion, SABIC sought judgment as a matter of law, claiming that there was no legally sufficient evidentiary basis for a reasonable jury to find for ExxonMobil, and that the evidence overwhelmingly supported a verdict in SABIC's favor.[17] Specifically, SABIC argued that the *ghasb* verdict was deficient as a matter of law because (1) the trial court declined to instruct the jury that under Saudi law, for SABIC to commit *ghasb* it must have acted "forcefully and with the victim's knowledge" (as distinguished from usurpation by secrecy or stealth), and (2) here, SABIC had acted secretively and without the victims' knowledge.[18]

The Superior Court denied that motion, ruling that (a) the court's determination of the Saudi law elements of *ghasb* on which it based the jury instruction was the culmination of many months of study, research, discussion and extensive expert testimony on Saudi law, including a separate live hearing on the subject;[19] (b) the court's rejection of the elements of "knowledge" and "force" advocated by SABIC was "consistent with the classical Hanbali authorities that would be followed by a Saudi judge;"[20] and (c) the jury verdict was not against the great weight of the evidence and indeed, was amply supported by the evidence.[21]

In its second (renewed) motion for judgment as a matter of law or, alternatively, a new trial or remittitur, SABIC contended that the damages award of $324 million (which

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[17] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 (Del. Super. Aug. 26, 2003).

[18] *Id.* at 2.

[19] *Id.* at 1, 2.

[20] The court found that the expert whose testimony was offered to support SABIC's view of the law, was "more of an advocate than an objective scholar of Islamic law." *Id.* at 4.

[21] *Id.* at 5.

SABIC characterizes as "enhanced damages"),[22] was unprecedented under Saudi [14] law and, therefore, the jury should not have been allowed to award damages above the actual $92 million overcharge. Alternatively, SABIC argued, it was entitled to a new trial wherein the jury would be given adequate instructions on enhanced damages, rather than being led to believe that an enhanced damage award follows automatically once the elements of *ghasb* are established. Those instructions (SABIC urged) should include a list of six factors that a Saudi judge would consider, plus the admonition that "enhanced damages" are permitted only under the most "unusual or egregious of circumstances."[23]

The Superior Court denied SABIC's motion, finding that its jury instruction relating to *ghasb* damages was correct and that the *ghasb* damages award was not against the great weight of the evidence. Specifically, the trial judge ruled that: (a) SABIC's argument that damages for *ghasb* are virtually unprecedented and rarely awarded in the Saudi legal system, was unsubstantiated, unverifiable and irrelevant;[24] (b) the jury instruction properly left any award of usurpation damages to the jury's discretion; (c) the six factors on which SABIC argued that the Court should have instructed the jury had no foundation in Saudi law as determined after a studied analysis based upon the authoritative texts; and (d) instructing the jury on the factors advocated

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[22] SABIC characterizes the $324 million component of the $416 million award as "enhanced damages," but at trial the Saudi law experts agreed that under Saudi law the injured plaintiff is entitled to recover compensatory damages for usurpation, which may include a return of the actual overcharged amounts *plus* the actual past profits obtained from the wrongful use of the overcharged amounts. Although SABIC's use of the term "enhanced damages" is vaguely suggestive of punitive damages, SABIC's expert, Dr. Frank E. Vogel, conceded that damages awarded for the tort of usurpation are not akin to punitive or exemplary damages.

[23] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *1, *2 (Del. Super. Aug. 26, 2003).

[24] *Id.* at 3.

by SABIC would be misleading and, in some cases, would invite inappropriate speculation.[25]

c. Proceedings After The Filing of This Appeal

After it commenced this appeal, SABIC filed a motion in this Court to supplement the record to include what SABIC characterized as an "official statement of Saudi Arabian law issued by the Ministry of Justice of Saudi Arabia." That "official statement" had never been presented to, or considered by, the trial court whose determinations of Saudi law had become final, subject only to review by this Court. SABIC's motion was also filed without leave of this Court. ExxonMobil vigorously opposed the motion. Weeks later, SABIC filed a motion to remand the case to the trial court to reconsider certain of SABIC's post trial motions for judgment as a matter of law, or alternatively for a new trial, in light of its newly-filed "official statement of Saudi law." This Court denied both motions as procedurally improper on January 29, 2004.

ANALYSIS OF SABIC'S CLAIMS OF ERROR

(1) THE STATUTE OF LIMITATIONS RULINGS

(a) The Issues Presented

Before the trial, SABIC moved for summary judgment as a matter of law on the ground that the application of Delaware's borrowing statute[26] resulted in ExxonMobil's twenty-plus year old claims being barred by Delaware's three year statute of limitations, 10 Del. C. § 8106. SABIC claimed that Exxon and Mobil had inquiry notice of their overcharge claims no later than 1994, and that there was no legal basis to toll the running of the statute. More specifically, SABIC argued that: (i) because ExxonMobil's claim arose "outside of Delaware" (i.e., in Saudi Arabia), the limitations periods prescribed by both Delaware and Saudi Arabian law were potentially **[15]** applicable; (ii) Delaware's borrowing statute

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[25] *Id.* at 2.

[26] 10 Del. C. § 8121.

borrowing statute required the Superior Court to apply the shorter of those two potentially applicable limitations periods; (iii) in this case, the shorter period of limitations was the three year period prescribed by *Section 8106*, and as result, ExxonMobil's claims were time-barred.

In a pretrial bench ruling, the trial judge denied the motion, holding as a matter of law that the borrowing statute did not apply and that ExxonMobil's claims were not time-barred under substantive Saudi law principles. Under Saudi law (which, all parties agree, governs ExxonMobil's contract and tort claims), property rights (including ExxonMobil's claims) are eternal and cannot be extinguished by the passage of time. As the trial judge explained:

> The Delaware borrowing statute, the purpose of it, is (a) to prevent forum shopping; and[](b) [] to protect the residents of Delaware.
>
> To apply the borrowing statute and [conclude] that Delaware's statute of limitation[s] would apply would basically turn the borrowing statute on its head for the purpose for which it was enacted.
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> SABIC purposefully chose this forum. And all indications strongly suggest that they chose this forum to obtain a shorter statute of limitations. So it [is] somewhat of a twist; in that, usually these cases involve a plaintiff who chooses this forum, hoping to get a longer statute of limitations .... So here, it's a twist on the normal set of facts. But the bottom line is: Our legislature intended to prevent people out of state, foreign plaintiffs, from coming into this forum and getting the benefit of a statute of limitations that really ought not to apply given the fact that the substantive law is interwoven with the procedural right.
>
> And here because Saudi law makes it clear and the parties don't dispute that Saudi law makes it clear, that a property right is eternal. And there is no concept in Saudi law that the usurper of the prop-

erty can rely on the passage of time to extinguish claims.

On that basis, the trial court ruled that ExxonMobil's claims were not time-barred as a matter of law. That ruling, SABIC contends, is erroneous because: (1) the Delaware borrowing statute does apply and as a result, makes applicable the shorter (three year) Delaware statute of limitations, which bars ExxonMobil's claims; (2) the three-year statute was not tolled or, alternatively, any tolling had ceased by 1994; and (3) even payments made by ExxonMobil within the three-year limitations period (*i.e.*, after 1997) are not recoverable because they represented continuing damages, as opposed to continuing wrongs.

SABIC's contentions frame the limitations-related issues, which are *first*, whether Delaware's borrowing statute applies; *second*, if so, whether the Delaware three year statute of limitations was tolled and if so, for how long; and *third*, whether post-1997 royalty payments made within the three year limitations period are also time-barred. We review these claims *de novo* for errors of law.[27] For the reasons next discussed, we uphold the trial judge's determination that the Delaware borrowing statute (and, as a consequence the Delaware three year statute of limitations) does not apply. We further conclude that, independent of the borrowing statute, the Delaware tolling statute tolled any limitations **[16]** period until SABIC commenced this action in July 2000, because before that time SABIC was not amenable to suit in Delaware and, therefore, was "out of the State" for tolling statute purposes.

(a) Applicability of The Borrowing Statute

It is undisputed that if Saudi law governs the limitations issue, then ExxonMobil's claims are not subject to any bar of limitations; but if Delaware law governs the limitations question, then the three-year statute applies and (absent

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[27] *City Investing Co. Liquidating Trust v. Cont'l. Cas. Co.*, 624 A.2d 1191 (Del. 1993); *Chrysler Corp.* (Del.), 822 A.2d at 1031, 1035.

tolling) bars ExxonMobil's claims.[28] The issue of which law applies turns upon whether the Delaware borrowing statute is applicable. That statute provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.[29]

This statute, if literally read and applied, would cause the three-year Delaware limitations statute to govern ExxonMobil's overcharge claim. SABIC urges us to adopt such a literal reading. SABIC argues that under the first sentence of *Section 8121*, ExxonMobil's cause of action arose "outside of this State," *i.e.*, in Saudi Arabia. Therefore, the applicable limitations period must be prescribed by Delaware law, which is the "shorter" of the "time limited by the law of this State" (Delaware: three years) and "the time limited by the law of the . . . country where the cause of action arose" (Saudi Arabia: no limitations period). Moreover, SABIC argues, the application of Delaware's three year statute is similarly mandated by its second sentence, because the two joint venture partnerships were "resident[s] of this State" at the time the "cause of action originally accrued."

The infirmity in SABIC's argument is that its literal construction of the borrowing statute, if adopted, would subvert the statute's underlying purpose. Our case law

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[28] Given our disposition of this issue, we do not reach SABIC's contention that the post-1997 royalty payments would not be recoverable.

[29] 10 Del. C. § 8121.

precedent eschews such a construction. As both this Court and the trial court have recognized, borrowing statutes "are designed to prevent shopping for the most favorable forum . . . ."[30] To accomplish that purpose, those statutes are normally designed to "shorten the time limit—not to extend it."[31] Borrowing statutes such as *Section 8121* are typically designed to address a specific kind of forum shopping scenario—cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that "standard scenario," the borrowing [17] statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.

Our decision in *Pack v. Beech Aircraft Corporation* illuminates that purpose. In *Pack*, the plaintiff brought a wrongful death action in a Delaware court under the New Jersey Wrongful Death Statute, which had a "built in" two-year statute of limitations. Had the lawsuit been brought in New Jersey it would have been time-barred, because the suit was not filed until after the two-year limitations period had expired. The plaintiff argued that the action was not time-barred, because the applicable statute was not the New Jersey statute but the Delaware three-year statute of limitations. Rejecting that argument, this Court held that Delaware's borrowing statute would be applied in order to enforce New Jersey's "built in" two-year limitations period:

> If a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with

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[30] *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957).

[31] *Id.*, citing 63 Harv. L. Rev. 1177, 1263 *Developments in the Law: Statutes of Limitation*, (1950) ("Borrowing statutes provide only a shorter time limit than the local period, which is still applicable to bar an action not barred by the borrowed foreign limitation.").

> him if the foreign statute prescribes a shorter time than the domestic statute. Our statute does not apply to a resident of this State suing on a foreign cause of action provided he was a resident when the cause of action arose. As to such a resident the common law rule that the *lex fori* governs the matter of limitations of actions is left in full force.[32]

Although the plaintiff in *Pack* was a resident of Delaware, this Court recognized that a literal application of the second sentence of Delaware's borrowing statute to that particular plaintiff would extend, rather than shorten, the applicable limitations period. This Court declined to apply the borrowing statute in such a literal way, because to do so would undercut the overriding purpose of borrowing statutes, which is "to prevent shopping for the most favorable forum." Because the two-year limitations period was "built in" to New Jersey's statutory cause of action for wrongful death, this Court applied Delaware's borrowing statute so as to "enforce the New Jersey law as we find it."[33]

The sane reasoning that led this Court to eschew a literal application of the borrowing statute in *Pack* requires us to uphold the reasoning of, and the result reached by, the trial court in this case. Here, ExxonMobil's claims arose under Saudi law, which imposes no time bar upon those claims. If ExxonMobil had prosecuted their overcharge claims in Saudi Arabia, their claims would not be time-barred. But ExxonMobil did not assert these claims in Saudi Arabia, or bring suit in Delaware as plaintiff to enforce those claims against SABIC. Rather, it was SABIC who came to Delaware to obtain an adjudication that (*inter alia*) Delaware's three year statute of limitations barred ExxonMobil's claims. Given the nature of SABIC's affirmative claim for declaratory relief, ExxonMobil was entitled to assert its overcharge causes of action as counterclaims for damages. In

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[32] *Pack*, 132 A.2d at 57.

[33] *Id.* at 60.

these circumstances, as the trial judge found, the party that was "shopping for the most favorable forum" was SABIC, not ExxonMobil.

The trial judge recognized that to apply the borrowing statute to ExxonMobil would subvert the statute's fundamental purpose,[34] by enabling SABIC to prevail [18] on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose, *i.e.*, Saudi Arabia. Because the Superior Court properly ruled that the borrowing statute did not apply, it follows that that court also correctly held that ExxonMobil's counterclaims to recover the royalty overcharges were not time-barred.

(b) The Application of The Tolling Statute

The conclusion that ExxonMobil's counterclaims were not time-barred was correct for a second, independent reason. Even if the borrowing statute did apply and thereby triggered Delaware's three-year statute of limitations, Delaware's tolling statute stopped the running of the three-year statute until SABIC filed this action in Delaware and as a result, became amenable to service of process. Our tolling statute provides:

> If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes

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[34] The correctness of the trial court's construction of the borrowing statute is also supported by other Delaware precedent. In *Air Prod. & Chem., Inc. v. Lummus Co.*, 252 A.2d 543 (Del. 1969), the plaintiff (like SABIC here) filed a preemptive action in Superior Court seeking a declaratory judgment that the defendant's threatened contract claim was barred by Delaware's three-year statute of limitations. There, as here, the contract claim had no relationship with the forum state (Delaware), and arose under the law of Puerto Rico, whose period of limitations was fifteen years. This Court required the declaratory judgment plaintiff, as a condition to requiring the litigation to proceed in Delaware, to stipulate that the Delaware borrowing statute would not be asserted as a defense. *Id.* at 545.

> into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action.[35]

It is settled law that the purpose and effect of *Section 8117* is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state.[36] In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process.[37]

Here, SABIC was "out of the state" and service of process upon SABIC could not have been accomplished in Delaware. Because SABIC lacked significant contacts with Delaware before it filed this lawsuit, the Delaware courts would have lacked personal jurisdiction over SABIC. Therefore, ExxonMobil could not have obtained personal jurisdiction over SABIC in Delaware. Only by voluntarily initiating this action in Delaware as plaintiff did SABIC "come [] into the State" and thereby become amenable to service of process.[38] **[19]** Thus, even if the three-year Delaware statute of

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[35] 10 Del. C. § 8117.

[36] *Hurwitch v. Adams*, 155 A.2d 591, 594 (Del. 1959).

[37] *Brossman v. FDIC*, 510 A.2d 471, 472-73 (Del. 1986) (statute of limitations tolled until the effective date of the Delaware long-arm statute because prior to that time the nonresident defendant was not amenable to service of process).

[38] Shortly after SABIC filed this action, ExxonMobil commenced an action in the New Jersey federal court, raising claims similar to its counterclaims here. SABIC immediately sought to dismiss that action, claiming that it was immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et. seq. ("FSIA") and could not be sued anywhere in the United States. The United States District Court for the Dis-

limitations were found applicable to ExxonMobil's claims, the running of that statute was tolled until the date that SABIC filed its Superior Court action.[39]

We conclude, for these reasons, that the Superior Court did not err by rejecting SABIC's defense (and claim-in-chief) that ExxonMobil's counterclaims are barred by the statute of limitations.

(2) THE EVIDENTIARY RULINGS

We turn next to SABIC's claim that the trial judge made four erroneous evidentiary rulings. We review rulings on the admission of evidence for abuse of discretion.[40] Where a court "has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."[41] We conclude that none of the contested evidentiary rulings constituted an abuse of discretion.

(a) The first contested trial court ruling,[42] is the exclusion of SABIC's proffered testimony of Ibrahim Bin Salamah, the SABIC official who negotiated the joint ven-

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trict of New Jersey held that SABIC's filing suit in New Jersey waived any FSIA immunity as to the overcharge claims in New Jersey and the Delaware courts. *Saudi Basic Indus. Corp.*, 194 F. Supp. 2d at 401-03, *vacated in part and remanded on other grounds*, 364 F.3d 102 (3rd Cir. 2004) (holding that the Rooker-Feldman doctrine deprived the federal court of subject matter jurisdiction over suit by ExxonMobil once final judgment on the identical issue was granted by the Delaware Superior Court.), *cert. granted*, --- U.S. ----, 125 S.Ct. 310, 160 L.Ed.2d 221 (2004).

[39] It is undisputed that ExxonMobil asserted their overcharge counterclaims well within the three-year period from the filing of SABIC's complaint.

[40] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 590 (Del. 2000); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[41] *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

[42] That ruling was one of several bases of SABIC's post-verdict motion for a new trial.

ture agreements. The proffered testimony was that Mr. Bin Salamah had personally told his counterparts at Exxon and Mobil that SABIC would receive a margin or "mark-up" on the Unipol® PE technology. That testimony, if allowed, would have contradicted the testimony of SABIC's Rule 30(b)(6) representative, Dr. Richard Pai, whom ExxonMobil had deposed three times. On each of those occasions Dr. Pai testified that SABIC always intended to charge the joint ventures a margin on the Unipol® PE technology, but had never informed Exxon, Mobil, Kemya or Yanpet of its intent. The proposed new testimony would also have directly contradicted Ben Salamah's previous deposition testimony—given only days before trial—that SABIC "never talk[ed] about the margin;" as well as SABIC's October 4, 2002 interrogatory responses, filed shortly before the trial, that expressly adopted Dr. Pai's testimony. Lastly, the proffered new testimony would have contradicted SABIC's responses to ExxonMobil's requests for admissions, in which SABIC represented that it had "no information that shows, one way or the other" whether SABIC had disclosed the royalty mark-ups to the joint ventures or to ExxonMobil.

Granting ExxonMobil's motion *in limine*, the trial court prohibited Mr. Bin Salamah from giving his proffered new testimony, on two grounds. First, that testimony would reverse all of SABIC's prior positions on this issue; and second, [20] the reversal of position would be highly prejudicial. The proffered testimony was never disclosed to ExxonMobil until SABIC filed its reply brief in support of its motion for summary judgment—long after the discovery cut-off date and at a time that ExxonMobil was effectively foreclosed from countering the new testimony. The persons to whom Mr. Bin Salamah had supposedly revealed this information were not available either to be re-deposed or to be called as rebuttal witnesses at trial. By that point in time, one of those witnesses had died and the other (who was never questioned about this subject at his deposition) was unavailable to testify at trial. Not surprisingly, the trial judge ruled that:

> [I]t was SABIC's conduct during discovery that resulted in exclusion of this testimony. Simply stated, had SABIC complied in good faith with the letter and spirit of our discovery rules before trial, the Court would probably not have been forced to exclude this portion of Mr. Bin Salamah's testimony.[43]

The trial court reasoned that Mr. Bin Salamah's new testimony was reasonably available to SABIC at all times during the discovery period; that Rule 30(b)(6) required SABIC's counsel to review that testimony with Mr. Bin Salamah before submitting the (contrary) Rule 30(b)(6) deposition testimony of Dr. Pai (as the spokesperson for the SABIC organization); and that the consequences of counsel's failure to do that should fall upon SABIC, not ExxonMobil.[44] On the basis of "fundamental fairness,"[45] the trial court concluded that to have "allowed Mr. Bin Salamah to testify on this subject . . . would have rewarded SABIC for discovery techniques that do not pass muster in this Court and would have resulted in a thorough sandbagging of ExxonMobil."[46] We agree. Given these facts, the trial court's evidentiary ruling could not possibly constitute an abuse of discretion. Mindful of that, SABIC attacks the ruling's factual and legal predicates. SABIC argues (contrary to the trial judge's finding) that Mr. Bin Salamah's new testimony would not have contradicted that of Dr. Pai, and that SABIC's counsel was not procedurally obligated to consult with Bin Salamah before Dr. Pai's Rule 30(b)(6) deposition. That argument amounts to little more than assertion without support in the record. Nowhere does SABIC come to grips with the case law that supports the trial judge's analysis and result. Having reviewed the record and applicable law, we conclude that

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[43] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 at *3 (Del. Super. Sept. 2, 2003).

[44] *Id.* at *4-*5.

[45] *Id.* at *3.

[46] *Id.* at *5.

the trial court's ruling is solidly grounded in both law and fact, and that SABIC's contrary arguments lack merit.

(b) The second contested evidentiary ruling was the admission into evidence of an internal memorandum by Exxon employee, John Webb, reflecting representations made by Mr. Bin Salamah in 1986, that the royalty rate called for by the SABIC/UCC license agreement for the Unipol®PE technology was identical to the royalty rate required by the SABIC-Kemya license agreement. SABIC claims that the Webb memorandum was admitted erroneously, because it was hearsay. The trial court, however, admitted the document as past recollection recorded, which is a recognized exception to the [21] hearsay rule.[47] We find no abuse of discretion in the admission of that document. Nor was SABIC prejudiced by its admission into evidence. The trial court gave SABIC the opportunity to cross-examine Webb about the memorandum and also to call Mr. Bin Salamah and elicit his denial that he made any statement to Webb. SABIC availed itself of both opportunities.

(c) The third contested evidentiary ruling is the admission of the testimony of two ExxonMobil employees, George Fitzpatrick and Robert Murphy, to the effect that SABIC had promised ExxonMobil a "pass through" license, and had represented (to Messrs. Fitzpatrick and Murphy) that SABIC had "passed through" its billings to Kemya and Yanpet at SABIC's cost. SABIC claims that this testimony was "multiple hearsay." That contention is misguided. A statement is not hearsay if offered only to prove that the statement was made, rather than for the truth of the matter asserted.[48] Here, Fitzpatrick's testimony about SABIC's statements was offered to rebut SABIC's defense that Exxon had waived its breach of contract claim, by showing that Exxon did not know about the overcharge and therefore could not have intentionally relinquished a known right.

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[47] D.R.E. 803(5).

[48] D.R.E. 801(c); *Fawcett v. State*, 697 A.2d 385, 387 (Del. 1997).

Nor could the out-of court statement attributed to SABIC (that there was no overcharge) have been offered for its truth, because the truth was the precise opposite.

Mr. Murphy's disputed testimony was also to the effect that SABIC had promised a "pass through" license and that it had passed through its billings to Kemya and Yanpet at SABIC's cost. Murphy's testimony also was not hearsay because it was not offered for its truth. The statement was offered to correct a misimpression, created during Murphy's cross-examination, that Murphy had been told that SABIC intended to make a profit from furnishing the Unipol® PE technology, yet despite being so informed, ExxonMobil made no effort to follow up on that disclosure. Nor was the Murphy testimony prejudicial, because Murphy had previously testified that he received assurances from SABIC that the UCC royalties would be passed through directly to Yanpet.

(d) The fourth contested evidentiary ruling concerns the limitation by the trial court of the scope of SABIC's proffered evidence of Exxon's subjective intent in connection with ExxonMobil's possibly providing polyethene technology to the joint ventures. SABIC attempted to prove Exxon's intent by offering into evidence drafts of never-executed agreements that predated the joint venture agreements. The trial judge excluded only the evidence and testimony that pertained to Exxon's internal state of mind, as distinguished from specific objective communications to and by SABIC on this subject (which were admitted). The trial court reasoned that Exxon's intent regarding never-executed agreements that predated the joint venture were not probative of Exxon's state of mind as of the later time when the parties did execute the joint venture agreements. This ruling was a rational exercise in determining the bounds of relevancy. Even more important, the ruling did not prejudice SABIC, which was permitted to introduce evidence of the earlier negotiations as of the time that (it appeared) Exxon and Mobil might provide the polyethylene technology to the joint ventures. Moreover, in closing argu-

ment SABIC's counsel was permitted to (and did) argue that SABIC believed that a [22] royalty mark-up was acceptable, based upon the parties' early negotiations relating to the possible provision of the technology by Exxon and Mobil. The jury chose not to credit that argument, however.

For these reasons, none of the contested evidentiary rulings constituted an abuse of discretion.

(3) THE RULINGS ON SABIC'S RELEASE DEFENSE

SABIC's third claim of error is that the trial court improperly struck SABIC's release defense. SABIC argues that the 1987 Letter Agreements, wherein ExxonMobil and SABIC renegotiated the joint ventures' license fees, operated to release all of ExxonMobil's payment-related claims against SABIC.[49] Because the court dismissed that defense as a matter of law, we review its ruling *de novo* for legal error.[50]

The trial judge ruled the release defense out of the case for three independent reasons. The first was that neither Exxon nor Mobil had signed the 1987 Letter Agreements; the second was that the plain language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and the third was that the only evidence on this issue from a Saudi law expert was the unrebutted testimony of Professor Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. We conclude that the trial court ruled correctly in all respects.

Articles 18.2 and 19.2 of the joint venture agreements expressly require that any "amendment, modification, or waiver of any provision" must be "in writing and signed by

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[49] SABIC argues that the trial court erred by granting ExxonMobil judgment as a matter of law on the release defense, and by denying SABIC's post-verdict motion for judgment as a matter of law on the basis of that same (previously stricken) defense of release.

[50] *Chrysler Corp.* (Del.), 822 A.2d at 1031, 1035.

the Partners." The term "Partners" is defined to mean SABIC and Exxon (in the Kemya Agreement) and SABIC and Mobil (in the Yanpet Agreement). Because Exxon and Mobil did not sign, and were not parties to, the 1987 Letter Agreements, they cannot be found to have waived claims under the joint venture agreements. The express requirement of a signature by the "Partners" in the joint venture agreement provisions, and the absence of any actual signatures by Mobil or Exxon, disposes of SABIC's contention that "the Exxon and Mobil partners [Kemya and Yanpet] are deemed to have signed the agreements ... because [they] were the joint venturers, and because they accepted the lucrative benefits of those agreements."[51]

In addition, the scope of the release provisions in the 1987 Letter Agreements is clearly limited to "UCC LDPE Technology" and "UCC HDPE Technology." Both terms are limited in the sublicenses to "technical information and data." There is no evidence that the parties (SABIC, Kemya and Yanpet) intended a meaning different from that connoted by the agreement's plain language.[52] Furthermore, **[23]** Professor Hallaq testified that under Saudi law, a release regarding the "object of the contract" (here, technology) cannot be construed as a release of claims relating to payment. That testimony is unrebutted.

Finally, as the trial court pointed out, Professor Hallaq, who was the only Saudi law expert who offered an opinion

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[51] That argument lacks even facial coherence in the case of the 1987 Letter Agreement between Yanpet and SABIC, because that agreement was signed on behalf of Yanpet by SABIC's Bin Salamah, who knew—but concealed from Mobil—that SABIC had received from UCC a larger discount than it was passing on to the joint ventures.

[52] Freddie Merrell, who was president of Yanpet at the time, testified that he did not believe that Yanpet was releasing any payment-related claims in the 1987 Letter Agreement. Similarly, Gregory McPike, who was a member of the Kemya board at the time, testified that he did not believe the 1987 Letter Agreement had anything to do with releasing payment-related claims, and that he did not have authority to release a "$180 million claim" on behalf of Exxon.

on the purported release, testified that even if the release language could be construed to cover claims for payment, under Saudi law the representations of Kemya and Yanpet in the 1987 Letter Agreements "are not binding and do not in any way preclude ExxonMobil's payment claims in this case." The reason (Hallaq testified) was that SABIC never disclosed that its royalty payments to UCC were less than Kemya's and Yanpet's royalty payments to SABIC. As a result, SABIC's representations in the 1987 Letter Agreements were "not accurate or complete." That testimony also stands unrebutted.

We conclude, for these reasons, that the trial court committed no error in dismissing SABIC's release defense as a matter of law.

(4) THE RULINGS ON EXXONMOBIL'S BREACH OF CONTRACT CLAIMS

By its verdict the jury found SABIC liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements.[53] Those provisions (the jury determined) were controlling and limited SABIC's royalty charges for providing Unipol® PE technology to the partnerships, to a "pass through" of SABIC's own cost of obtaining a license for that same technology from UCC. During the trial, SABIC moved for judgment as a matter of law on ExxonMobil's contract claim, and after the adverse jury verdict, SABIC moved (again) for judgment as a matter of law or, alternatively, for a new trial. The trial judge denied both motions and judgment was ultimately entered against SABIC on the contract trial court's rulings, or any legal insufficiency of evidence to support the jury verdict, with respect to ExxonMobil's breach of contract claims.

On appeal, SABIC contends that the trial judge erred in denying its pre (and post) verdict motions for judgment be-

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[53] Except where the context shows otherwise, the references (in the singular) to Article 6.3 and to Article 6.1, are to Articles 6.3 and 6.1 of both the Yampet and the Kemya joint venture agreements.

cause: (1) as a matter of law Article 6.3 does not apply to SABIC's provision of the Unipol® PE technology to the joint venture partnerships; rather, the parties intended that Article 6.1—which does not require a cost "pass through"—would control; and (2) in any event, the joint venture agreements do not govern what royalties SABIC could charge for providing the Unipol® PE technology to the joint venture partnerships. The reason (SABIC argues) is that the parties intended that the later-executed Unipol® PE/UCC technology sublicense agreements between SABIC and the joint venture partnerships—which have no "pass through" provision—would supersede and repeal any application of Article 6.3 of the joint venture agreements.[54]

[24] To the extent SABIC claims that the trial court determined the applicable law incorrectly, or instructed the jury erroneously, or failed to grant judgment as a matter of law because of legally insufficient evidence, we review those claims *de novo* for legal error.[55] We will not disturb a jury's findings of fact on the basis of legally insufficient evidence, however, if there is "any competent evidence upon which the verdict could reasonably be based."[56] Having applied the appropriate review standards to the facts and evidence of record, we discern no error of law in the trial court's rulings, or any legal insufficiency of evidence to support the jury ver-

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[54] Alternatively, SABIC contends that it is entitled to a new trial to allow SABIC to present to the jury the same contract defenses that were the subject of its motions for judgment as a matter of law. That contention lacks merit because SABIC was allowed to present those defenses to the jury, which chose not to accept them. 2003 WL 22048236 at *3. Because we conclude that the trial court correctly rejected the contentions that underlie SABIC's motions for judgment, and that the jury's verdict (which was adverse to SABIC) is based upon competent and legally sufficient evidence, we do not further address SABIC's new trial argument.

[55] *Chrysler Corp.* (Del.), 822 A.2d at 1034, 1036; *City Co. Liquidating Trust v. Cont'l., Cas. Co.*, 624 A.2d 1191, 1194 (Del. 1993).

[56] *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear*, 596 A.2d at 1358, 1362 (Del. 1991) (quoting *Turner v. Vineyard*, 80 A.2d 177, 179 (Del. 1951)).

verdict, with respect to ExxonMobil's breach of contract claims.

(a) SABIC's Argument That Article 6.3 Does Not Apply To ExxonMobil's Claims For Breach of Contract

Our analysis of SABIC's first challenge to the judgment for breach of contract starts with the uncontested fact that when SABIC furnished the Unipol® PE technology to the joint venture partnerships, SABIC did not limit its royalty charges to the partnerships to a "pass through" of its own cost to procure that technology from UCC. It is undisputed that SABIC charged the partnerships a "mark up" over and above its actual cost. The record discloses substantial evidence (based upon which the jury found as fact) that SABIC had concealed those markups from ExxonMobil for almost two decades.

SABIC virtually concedes that those facts would constitute a violation of Article 6.3 of the joint venture agreements, if (as the jury found) Article 6.3 governs the overcharge breach of contract claims. SABIC can hardly contend otherwise, as Article 6.3 of the Yanpet agreement directs that "to the extent either Partner or any Affiliate thereof procures patents, processes, and other licensing rights of third parties, and sublicenses such rights to the Partnership, *it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.*"[57] Article 6.3 of the Kemya joint venture agreement is substantially identical. SABIC's position must therefore be (and indeed is) that Article 6.3 does not govern the overcharge claims. That position contains two prongs.

SABIC first argues, as it did in the Superior Court, that Article 6.3 does not apply to the Unipol® PE technology that SABIC licensed to the joint ventures. According to SABIC, Article 6.3, by its plain terms, applies only to partner-*licensed* polyethylene technology that is then sublicensed to

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[57] Yanpet Joint Venture Agreement, Art. 6.3 (italics added).

the joint ventures, as distinguished from partner-*owned* polyethylene technology that is then licensed to the joint venture. SABIC argues that the parties intended that Article 6.1(a)—which does not require a cost pass-through but instead allows the parties to negotiate transaction-specific financial terms—would apply to partner-owned polyethylene technology. Article 6.1, SABIC asserts, "plainly reflects the parties' intent that separate, later-executed technology [l]icenses, not the [25] [joint venture] agreements, would exclusively govern the provision by a partner of the technology 'required' to 'manufacture' polyethylene." Because SABIC owned the Unipol® PE technology, Article 6.3 does not apply and therefore (SABIC concludes), no breach of Article 6.3 could legally have occurred.

The Superior Court rejected this argument on the ground that it ignores the plain language of Articles 6.3 and 6.1, as well as the substantial persuasive evidence that undermines SABIC's position. We conclude that the trial court ruled correctly. SABIC's entire position rests upon a distinction between partner-licensed and partner-owned polyethylene technology. Article 6.3, however, makes no such distinction. Article 6.3 does not exclude partner-*owned* polyethylene technology from its coverage. Indeed, that provision covers technology that a partner "procures," and as the trial judge held, "[a] reasonable jury could conclude that 'procures' includes a 'purchase.' In fact . . . a number of witnesses at trial . . . testified that 'procures, as it appears in Articles 6.3, would include a purchase of technology."[58]

SABIC's distinction does not aid its position for a second reason: a reasonable jury could have found that SABIC was a licensee, not the owner, of the Unipol® PE polyethylene technology. That technology SABIC then sublicensed to the partnerships—the very scenario that is contemplated and covered by Article 6.3. The trial court so held:

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[58] *Saudi Basic Indus. Corp.*, 2003 WL 22048236 at *3.

> SABIC's argument that it purchased the Unipol® PE technology and then licensed it to the Joint Ventures rings hollow in light of the great weight of evidence in the form of documents that refer to *sub* licenses .... The record is replete with documents referencing the UCC-SABIC transaction as a license and the SABIC Joint Venture transactions as sublicenses. SABIC's witnesses attempted to explain to the jury that while the term "sublicense" may have been used, SABIC "attached no legal meaning" to that term. The overwhelming documentary evidence supports the jury's finding that the true character of the UCC-SABIC agreement was a license, that the agreements with KEMYA and YANPET were sublicenses, and that Articles 6.3 applied.[59]

SABIC next argues that the evidence conclusively establishes that the parties intended for Article 6.1 of the joint venture agreements (which contains no pass-through requirement)—not Article 6.3 (which does)—to govern the terms under which SABIC could sublicense the Unipol® PE technology to the joint venture partnerships. Only if the plain language of Article 6.1 is ignored can this argument attain plausibility, because in fact Article 6.1 fatally undercuts SABIC's claim.

Article 6.1(a) of the Kemya joint venture agreement provides that:

> To the extent patents and licensing rights and related technical proprietary information are in the opinion of the Partners required to design and construct the Petrochemical Plant and produce Manufactured Products, ECAI [Exxon Chemical Arabia Inc.] *and its affiliates* to the extent they are permitted (without having to account to a third party) shall offer to provide to the Partnership, all such

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[59] *Id.* (internal footnotes omitted).

> patents, licensing rights, technical and proprietary information necessary to perform its obligations [26] hereunder consistent with Annex XI hereto.[60]

Article 6.1 explicitly and specifically refers to Exxon and Mobil, but that provision does not in any way mention, refer or even allude to SABIC. For that reason alone the jury had a reasonable basis to find that Article 6.1 does not apply to SABIC and, therefore, confers no rights upon SABIC.

On appeal SABIC argues—as it did before the trial court and the jury—that the references to "ECAI and its affiliates " in Article 6.1 of the Kemya joint venture agreement, and to "*MOBIL and/or MOBIL Affiliates*" in Article 6.1 of the Yanpet joint venture agreement,[61] must be construed to mean "a partner." Under that construction, SABIC would be an "affiliate" of Mobil or Exxon because those entities are partners in the two joint ventures.

That argument labors under multiple infirmities. Nothing in the joint venture agreements or in any case law cited by SABIC persuasively supports, let alone compels, that interpretation. To read "affiliates" as including all entities with which Mobil and Exxon have formal relationships as partners—a construction that SABIC insists the jury was

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[60] Kemya Joint Venture Agreement, Art. 6.1 (italics added). Article 6.1 of the Yanpet joint venture agreement is substantially identical. It provides:

> To the extent patents and licensing rights and other technical and proprietary information which are owned or controlled by Mobil and/or Mobil Affiliates are required to design and construct the Petrochemical Complex and manufacture the Manufactured Products, Mobil and its Affiliates shall provide all such patents and licensing rights and other technical and proprietary information to the Partnership, necessary to perform its obligations hereunder on mutually agreeable terms and conditions.

Yanpet Joint Venture Agreement, Art. 6.1 (italics added).

[61] *See* note 60 *supra*.

required to accept as a matter of law—would be odd, to say the least. SABIC was not an "affiliate" of Mobil or Exxon as that term is commonly and ordinarily understood.[62] To the contrary, SABIC was ExxonMobil's bargaining adversary, the party on the other side of the arm's-length negotiations that resulted in the joint venture agreements. Reuel Agarrado, SABIC's own witness, testified that Article 6.1 "does not apply to SABIC." There is no evidence that SABIC ever informed Exxon or Mobil that it was relying upon Article 6.1 when SABIC violated the pass-through terms of Article 6.3. Nor did SABIC ever allege in its original or amended complaint that it had relied upon Article 6.1.

Despite these infirmities, the trial court allowed SABIC to present its Article 6.1 argument to the jury, which ultimately rejected it. The jury's rejection of SABIC's argument has an ample and sufficient basis in the evidentiary record, as did the trial judge's post-trial ruling that the jury was justified in reaching that result:

> The Court notes that at trial ExxonMobil introduced a copy of [SABIC's] Second Amended Complaint ... and Article 6.1 of the Joint Venture Agreements is nowhere mentioned in that complaint. The Court also notes that SABIC witnesses admitted that they never advised anyone at Exxon or Mobil that SABIC believed Article 6.1(a) applied to the provision of Unipol® PE technology to the Joint Ventures. Given all of this, there is more than a sufficient basis from which a reasonable jury could conclude [27] that SABIC's Article 6.1(a) argument was an afterthought, and an unavailing one at that. This Court seriously considered precluding SABIC from presenting [that] argument ... because of the lack of evidentiary basis supporting such an argument, and because the argument was

[62] For example, SABIC was not a parent, or a subsidiary, or a sister corporation, of Exxon or Mobil, or of any person or group that controlled Exxon or Mobil.

> not asserted until very late in [the] litigation .... After ... characterizing SABIC's claim ... as "hanging on by a thread," the Court nonetheless permitted SABIC to argue this to the jury over ExxonMobil's objection. Thus, SABIC had a full and fair opportunity to present this argument to the jury for its consideration. The jury rejected it .... [T]here is no basis to overturn the jury's rejection of that argument.[63]

We find that ruling to be free from error and correct.

(b) SABIC's Argument That The Sublicenses Supersede And Repeal Any Application of Article 6.3

Alternatively, SABIC contends that even if Article 6.3 does govern (thereby limiting SABIC's royalty charges to a pass through of its actual cost of obtaining the Unipol® PE technology), in this case Article 6.3 had no force or effect, because the SABIC/Kemya and SABIC/Yanpet sublicense agreements superseded and repealed any application of Article 6.3.

The trial court rejected this argument, holding that:

> SABIC next argues that, under Saudi rules of contract interpretation, the Joint Venture polyethylene licenses which were entered into in November and October 1980 "trump" the general provisions of the Joint Venture Agreements, including Article 6.3. In support of this argument, SABIC states that under Saudi law, partnership agreements like the Joint Venture Agreements are *ja'iz* contracts, which are not prospectively binding on the partners but rather serve as a starting point for later, transaction-specific agreements. The later transaction-specific contracts are *lazim* agreements which are prospectively binding on the partners and "trump" inconsistent terms of *ja'iz* contracts. According to

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[63] 2003 WL 22048236 at *3.

this argument, the detailed transaction-specific nature of the Unipol ® PE technology licenses makes them *lazim* contracts that supercede [sic] Article 6.3 of the Joint Venture Agreements. The infirmity of this argument is that there is no evidence in the record to suggest that Exxon or Mobil knew that SABIC was deriving a profit from its provision of the Unipol® PE technology to the Joint Ventures or that Exxon or Mobil knew the financial terms in the UCC-SABIC license. Thus, as a matter of law, the sublicenses cannot possibly modify Article 6.3 of the Joint Venture Agreements. In fact [on ExxonMobil's motion for judgment as a matter of law the Court pointed out that] on SABIC's contract modification argument, the parties' Saudi law experts agreed that . . . for there to be a modification of an agreement, the [parties] to the agreement must have conferred on the proposed modification and understood what they were agreeing to . . . .

While the Saudi law experts who testified disagreed on many aspects of Saudi law, they did agree that it was not possible under Saudi law to modify an agreement unless the parties understood that they were modifying an agreement and understood the terms of the modification. There is no evidence in the record that Exxon or Mobil knew that the financial terms of the sublicenses were different than the UCC-SABIC license . . . . **[28]** SABIC can point to no set of factual circumstances that suggest Exxon or Mobil understood, much less intended, that the sublicenses modified Article 6.3. The Court also notes that Article 18.2 of the KEMYA Joint Venture Agreement and Article 19.2 of the YANPET Joint Venture Agreement specifically require that any amendment, modification or waiver of any provision of the Joint Venture Agreement be in writing and signed by the partners. Dr. Hallaq testified that these provisions would be honored under Islamic principles of contract law. Because Exxon

> and Mobil, the partners, never signed the sublicenses ... the sublicenses cannot possibly supercede [sic] or modify the Joint Venture Agreements as a matter of Saudi law.[64]

The above-quoted analysis effectively disposes of SABIC's argument that the sublicense agreements modified and superseded Article 6.3 of the joint venture agreements. Nothing advanced by SABIC on this appeal straightforwardly addresses the trial court's reasoning. SABIC asserts that the trial judge misunderstood the significance of the *ja'iz* nature of the joint venture agreements, but that assertion ignores the testimony of SABIC's own Saudi law expert, Professor Frank E. Vogel, that even *ja'iz* partnership contracts remain binding on the partners unless and until the partners reach agreement on the changed terms. That event never occurred here. As Professor Hallaq explained, under Saudi law, the sublicense agreements cannot be deemed to supersede the obligations upon which the parties agreed in Article 6.3 of the joint venture agreements, because no language in the sublicense agreements purports to waive SABIC's obligations to ExxonMobil under those that provision. "This absence of waiver," Professor Hallaq explained, "is dictated by the Islamic legal principle that unspecific, general or implied language cannot supersede specific and clear language which Articles 6.3 ... represent."[65]

SABIC's remaining challenges to the trial court's breach of contract rulings are equally unavailing.[66] The evi-

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[64] 2003 WL 22048236 at *4 (internal footnotes omitted).

[65] The expert testimony establishing the applicable principles of Saudi contract law vitiates SABIC's claim on appeal that the integration clauses of the sublicenses (which nowhere specifically purport to modify or supersede Article 6.3 of the joint venture agreements) must be regarded as "conclusive evidence " that the parties intended to supersede the prior joint venture agreements.

[66] SABIC also assails the trial judge's determination that the sublicenses could not possibly modify or supersede the joint venture agree-

dence amply suffices to sustain the jury's finding that the joint venture agreements, and specifically Article 6.3, controlled ExxonMobil's [29] contract claims and was not superseded by the sublicense agreements. No authority that SABIC presented either to the trial court or to us required the trial judge or the jury to accept SABIC's contrary position as a matter of law. Because the jury verdict finding SABIC liable for breaching Article 6.3 of the joint venture agreements was properly grounded both legally and factually, it must stand.

(5) THE RULINGS ON EXXONMOBIL'S CLAIMS OF USURPATION (*GHASB*)

SABIC reserves its final and most extensive set of challenges for the portion of the judgment holding SABIC liable to ExxonMobil for committing the tort known under Saudi law as "usurpation" or "*ghasb*." The amount of the jury award and judgment for usurpation was $416.8 million, which includes both the amount of overcharged royalties ($92.8 million) and the profits SABIC obtained from using those overcharges in its business ($324 million).

SABIC divides its challenges to the usurpation award into two separate categories of claimed error: (1) errors that

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ments because Mobil and Exxon did not sign the sublicense agreements. Exxon's and Mobil's actual signatures were not needed, SABIC argues, because the signature of SABIC—Exxon's and Mobil's partner in these joint ventures—was legally sufficient to bind Exxon and Mobil. This argument, like others advanced by SABIC, ignores the plain language of the governing contract. The joint venture agreements explicitly require that any amendment, modification or waiver of any provision of the joint venture agreements be "in writing and signed by the partners." The term "Partners" is defined in the Kemya agreement to mean SABIC and Exxon; and in the Yanpet agreement, is defined to mean SABIC and Mobil. SABIC's argument ignores the definition of "Partners," as well as the evidence provided by its own witness, Mr. Bin Salamah, who testified that when the partners intended to modify the joint venture agreement, they "sat down in a room and agreed in writing and signed it at the bottom of the page." It is undisputed that no authorized representative of Exxon and Mobil ever sat down in a room with SABIC and signed the sublicense agreements.

resulted in SABIC being held liable for usurpation, and (2) errors that resulted in an award of what SABIC describes as "enhanced damages."[67] For both categories, SABIC argues that it is entitled to judgment as a matter of law on ExxonMobil's *ghasb* claims of liability and enhanced damages; or alternatively, to a new trial on both the liability and enhanced damages issues.

In support of its challenges SABIC advances five separate claims of error. First, SABIC contends that the trial court as a matter of law erred in denying its motion for judgment, because to be found liable for *ghasb* under Saudi law, ExxonMobil was required to—but did not—establish "an open and obvious taking that is intentional and without any color of right." SABIC argues that all ExxonMobil alleged and proved was that SABIC had engaged in "secret conduct ... based upon color of right." Those contentions also form the basis for SABIC's second argument, which is that SABIC is entitled to a new trial on the issue of liability for *ghasb*, because the trial court erroneously declined to instruct the jury that the wrongdoer's actions must be "open, obvious, intentional and without color of right." Third, SABIC claims that it is entitled to judgment as a matter of law on the claim for enhanced damages, because no Saudi court would award enhanced damages in a contract case such as this one. Fourth, and alternatively, SABIC contends that it is entitled to a new trial in which the jury would be given adequate guidance in considering whether to award enhanced damages. Fifth, and finally, SABIC argues that

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[67] SABIC characterizes the latter component of the usurpation award (the profits earned from the overcharges) as "enhanced damages," to accentuate its argument that a disgorgement of profits is "unprecedented" and should not have been allowed in this case. ExxonMobil, on the other hand, characterizes the entire amount of the award as "compensatory damages," to underscore its position that past profits obtained by the tortfeasor's wrongful use of the overcharged amounts is an element of allowable damages for usurpation with "solid support" in the treatises of the Hanbali guild or school of Islamic law, the school that Saudi judges are instructed to follow.

the trial court, although purporting to employ the methodology that a Saudi judge would follow to determine the applicable Saudi law ("*ijtihad*"), in fact invoked *ijtihad* merely as a "post hoc rationalization" for foreign law rulings that were essentially arbitrary and unprincipled.[68]

[30] To the extent SABIC contends that the Superior Court made incorrect determinations of Saudi law or instructed the jury incorrectly on issues governed by Saudi law, such determinations and jury instructions are treated as rulings on a question of law and are subject to *de novo* review.[69] But where, as here, the trial court's determination of foreign law rests on the credibility of foreign law experts, the trial court's predicate credibility findings will be accorded appropriate deference.[70]

(a) The Trial Court's Use of The Ijtihad Methodology To Determine Saudi Law

We first address SABIC's fifth argument, because it challenges the methodology that the trial court employed to determine Saudi law, and, thus by its very nature, assails the procedural foundation of all of the challenged substantive Saudi law rulings. In essence, SABIC claims that the *ijtihad* process that the trial judge employed to determine Saudi law was "free wheeling," "standardless," and a "bare

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[68] Appellant's Op. Br. at 40-41.

[69] SUPER. CT. CIV. R. 44.1; *see Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (trial court's jury instructions reviewed *de novo*); *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 n. 2 (Del. 2000) (foreign law determinations treated as rulings of law and reviewed *de novo*).

[70] *See, BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 268 (3rd Cir. 2000) ("[T]he District Court is in the best position to determine what at this point is essentially a credibility issue—i.e, which [foreign law] expert to believe."); *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.*, 145 F.3d 463, 476, n. 7 (1st Cir. 1998) ("[T]he finder of fact is entitled to make its own assessment of the credibility of [foreign law] experts.").

'guess' as to the correct content of Saudi law."[71] We reject these contentions, because the record clearly establishes that the trial judge went to extraordinary lengths to understand the applicable Saudi law and to make rulings that were consistent with the numerous Saudi law sources presented to her. To understand how and why that is so, a prefatory discussion of the Saudi system of jurisprudence, and of the Saudi *ijtihad* analytical approach, is helpful.

In Saudi Arabia, Islamic law (*shari'a*), which is a fundamentally religious law based on both the *Q'uran* and the model behavior of the Prophet Muhammed, is the law of the land. Although early Islamic law scholars eventually coalesced into various guilds or schools, only four of those guilds have survived in modem times: the Hanbali, the Hanafi, the Shafi'i and the Maliki. In Saudi Arabia, the judges are instructed to rule exclusively in accordance with the teachings of the Hanbali guild.[72]

The Saudi law system differs in critically important respects from the system of legal thought employed by the common law countries, including the United States. Perhaps most significant is that Islamic law does not embrace the common-law system of binding precedent and stare decisis. Indeed, in Saudi Arabia, judicial decisions are not in themselves a source of law, and [31] with minor exceptions, court decisions in Saudi Arabia are not published or even open to public inspection.

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[71] SABIC also asserts that *ijtihad* was "raised for the first time in post-trial briefing" and that "the court never indicated prior to its post-trial orders that it was engaging in *ijtihad* to determine either the elements of *ghasb* or the availability of enhanced damages." *Id.* at 40. That assertion is contradicted by the record, which discloses that the trial judge questioned one of the expert witnesses about the *ijtihad* methodology during the Saudi law hearing, and that the judge indicated that she had relied upon that methodology in ruling upon a pre-trial motion for summary judgment.

[72] Dr. Vogel, SABIC's Saudi law expert, agreed that Saudi judges hew conservatively to the Hanbali school.

The trial judge was keenly mindful of this distinctive characteristic of Saudi law and of the problems that it created for defining the elements of, and remedies for, *ghasb* and for how to instruct the jury on those issues. The court observed:

> SABIC's arguments ignore the simple truth that the circumstances under which *ghasb* (usurpation) damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis*. Contrary to the implication of SABIC's briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for, the Saudi law tort of *ghasb*. Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghasb*. To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of *ghasb*.... Finally, because Saudi law decisions are not published, even if the decisions had precedential value (which all the experts agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.[73]

Instead of relying upon statutes or decisional precedent to discern the law applicable to a particular case, judges in Saudi Arabia must "first and last ... navigate within the boundaries" of the Hanbali school's authoritative works, which are the scholarly treatises primarily consulted by Saudi judges.[74] Using these scholarly writings as guides,

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[73] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 (Del. Super. Aug. 26, 2003) at *1 (italics in original, internal footnotes omitted).

[74] Particularly important are two works by Mansur al-Bahuti, a 17th century scholar, as well as the works of Ibn Qudama and Al Maqdisi.

Saudi judges identify a "spectrum of possibilities on any given question, rather than a single 'correct' answer."

Thus, in this highly different legal environment, the predominate factor in determining the Saudi law on a given issue is the study and analysis, or *ijtihad*, that a judge brings to bear in each particular case. To state it in different terms, the critical inquiry is whether "the proper analytical procedures are followed in reaching the results." The trial judge so recognized, observing that "[w]hen faced with the daunting task of determining the elements of *ghasb* and the damages available for this tort, the Court, weighing the credibility of each Saudi law expert, exercised, as best it could under the circumstances, *ijtihad*, to reach the 'right' result."[75]

Mindful of how "daunting" would be the task of determining the Saudi law principles applicable to this case, the trial judge made exceptional efforts to ensure that she was fully informed of the Hanbali teachings upon which to ground her legal rulings. Before trial, the parties presented the trial judge with seven reports from four Saudi law experts (two expert witnesses for each side), as well as each expert's lengthy deposition. Perceiving a conflict in the experts' opinions, the trial judge retained an independent expert, **[32]** Mr. Herbert S. Wolfson, and obtained his advice on critical issues, including the elements of, and the damage remedies available for, usurpation. Mr. Wolfson prepared an initial report and the trial court permitted him to conduct additional research in Saudi Arabia, after which Wolfson prepared a supplemental report and was deposed for a full day. After reviewing a total of nine reports and over one thousand pages of deposition testimony, the trial judge then held a day-long pretrial hearing, to permit the parties to

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[75] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *2, n. 8 (Del. Super. Aug. 26, 2003) (citing the testimony of Professor Hallaq that every time a Muslim judge exercises *ijtihad*, "it is basically his best . . . effort to find what is the right thing to do . . . " and the testimony of Herbert S. Wolfson, that a Saudi judge performing *ijtihad* tries to do the "right thing.").

present live testimony from Professor Hallaq, Dr. Vogel and Mr. Wolfson. Only after this extensive process did the trial court undertake to determine the disputed elements of *ghasb*. Even after that comprehensive inquiry, the court considered (over ExxonMobil's objection) two additional reports of Dr. Vogel submitted post-trial.

It is notable that only after SABIC received the adverse jury verdict did it attack the trial court's *ijtihad* had process, even going so far as to contend, in a post-trial affidavit of Dr. Vogel, that the trial judge "was simply not qualified to practice *ijtihad*." SABIC advances that same position on appeal. Confronting that contention, the trial judge made the following observations which, in our view, afford a complete answer to SABIC's position:

> What troubles the Court even more is that Dr. Vogel opines that this Court cannot credibly engage in the *ijtihad* process. According to Dr. Vogel, "*ijtihad* requires for its credibility qualifications which on the very face of things, neither Prof. Hallaq, myself or, with respect, any U.S. Court possesses." If Dr. Vogel is correct, then why did SABIC choose to file this dispute in a United States Court? If Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then what Saudi law "expert" would be able to assist this United States Court in determining the applicable Saudi law?
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> * * * * * *
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> It is remarkable that SABIC, having [purposefully] selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that no American judge is qualified to interpret and apply Saudi law. This is particularly in-

credible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.[76]

As we view it, the careful, painstaking inquiry that the trial judge conducted puts to rest SABIC's contention that she engaged in a standardless, "seat of the pants" determination of the disputed Saudi law issues. It is one thing for SABIC to argue that one or more specific decisions resulting from the trial judge's inquiry are legally erroneous. On this record, however, it is not fair for SABIC to contend that the trial court's analytical process itself was arbitrary, unprincipled or lawless.

We turn next to the specific legal errors that SABIC claims the trial judge made in her *ghasb* liability and damages determinations and jury instructions.

(b) The Claim That The Trial Court Determined The Legal Elements of Ghasb Erroneously

After considering the extensive documentary and testimonial evidence of Islamic [33] law pertaining to *ghasb*, the trial court determined that:

> In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.[77]

SABIC does not dispute that ExxonMobil factually established each of those elements. Rather, SABIC argues on appeal, as it did in the Superior Court, that the trial court's formulation of the tort of usurpation is erroneous because *ghasb* includes two additional elements that the trial court ignored: (1) SABIC's taking of the joint ventures' property

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[76] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *4 (Del. Super. Aug. 26, 2003) (italics in original, internal footnotes omitted).

[77] *Id.* at *1.

must be "open and obvious," and (2) the taking must be "intentional and without any color of right." Thus, SABIC argues that it cannot be adjudicated as a usurper so long as its seizure of its partners' property was surreptitious, as distinguished from being open and obvious.

The trial judge rejected this argument on the ground that SABIC's two additional proffered elements find no support in the Hanbali works, as explicated by the Saudi law experts whose testimony she found to be credible. Having reviewed the extensive record developed on this issue, we conclude that the trial judge's legal rulings, and the intermediate evidentiary and factual rulings upon which they are grounded, are correct.

Bearing importantly on this issue, as the trial judge found, is that "[as] Mr. Wolfson opined . . . there is no single binding definition of *ghasb*, 'but rather a range of possibilities.'" Dr. Vogel testified that . . . there is "no single 'binding definition of usurpation [or *ghasb*]." [78] Not surprisingly, all three experts "differed on the proper elements of a *ghasb* claim." [79] That being the case, the trial judge had no alternative but to decide which expert's testimony to accept or reject. The trial court determined to accept the opinion testimony of Professor Hallaq and Mr. Wolfson, and to reject that of Dr. Vogel. The court found:

> ExxonMobil points out that Dr. Vogel's "varying and inconsistent" definitions of *ghasb* only confirm that there is no one correct definition. The Court is inclined to agree. Each time he opined on the subject, Dr. Vogel's definition [of] *ghasb* seemed to change . . . .
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> The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on

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[78] *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *4 (Del. Super. Aug. 26, 2003) (internal footnotes omitted).

[79] *Id.* at *3.

> the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of Islamic law. His relentless attacks on Dr. Hallaq's qualifications and expertise further undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.[80]

That finding is entitled to deference on appeal. Based upon the testimony of Mr. Wolfson (and even, to some extent, of Dr. Vogel), the trial court determined that SABIC's first disputed element—an "open and obvious" taking—cannot be located in [34] the works of the Hanbali school. As Mr. Wolfson noted, "the most influential Hanbali scholars, whose works enjoy tremendous respect in Saudi Arabia," do not "include openness or notoriety as elements in the definition of *ghasb*." Dr. Vogel also agreed that the Hanbali scholars do not include open and notorious in their definition of usurpation, and he conceded that even if the victim is completely unaware that a taking has occurred, the taking qualifies as usurpation:

> Q. Now suppose, just suppose, I have a bunch of horses, okay? .... And you come into my corral and take one of my horses, but I'm in Brazil.... So I have no idea that you have in fact taken my horses.... And, indeed, when I come back, I don't know that the horse is gone?... That would be usurpation, too, wouldn't it?
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> A. Yes.[81]

In short, the record supports the trial judge's foreign law determination that the Hanbali sources do not require that the wrongful exercise of ownership or possessory rights

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[80] *Id.* at *4 (footnotes omitted).

[81] Professor Hallaq explained that "[t]he victim doesn't have to know that he was violated in order to be considered a victim of usurpation."

over the property of another must be "open and obvious." Nor do the Hanbali texts support SABIC's second argued-for element, that the taking must be "intentional." SABIC bases that argument upon the (rejected) testimony of Dr. Vogel, who never identified any Hanbali source that supports a definition of usurpation which includes an element of intentional transgression. Mr. Wolfson, whose testimony the trial judge did accept in some important respects, opined that "the intent to infringe cannot possibly be a necessary element" of a civil claim for usurpation, based on numerous examples of usurpation in the authoritative texts that demonstrate that even an innocent purchaser of wrongfully taken property can be held liable. Although the usurper must "inten[d] to exercise ownership, he need not inten[d] to infringe the rights of the true owner." The trial judge's determination of Saudi law, based entirely on expert testimony, is entitled to deference, as no basis has been shown to overturn it.

Accordingly, we find that the trial court committed no error in submitting the usurpation claim to the jury or in denying SABIC's motion for judgment as a matter of law.

(c) The Claim That The Trial Court Instructed The Jury Erroneously On The Elements of Ghasb

SABIC next argues that even if the trial court was correct in denying its motion for judgment as a matter of law, the court erred by not granting SABIC's alternative motion for a new trial. The basis for this argument is that the jury was not, but should have been, told that to find that SABIC committed usurpation, it must find that SABIC's conduct was "open, obvious, intentional, and without color of right." We have rejected that argument as the basis for SABIC's claim of entitlement to judgment as a matter of law. The argument fares no better when it is recast as a claim of entitlement to a new trial. Because we have upheld the trial court's determination that to constitute usurpation a wrongdoer's conduct need not be open, obvious, or intentional, it follows that the trial court committed no error in refusing to

instruct the jury on definitional components that were not elements of that tort under Saudi law.[82]

[35]*(d) The Claim That The Trial Court Erroneously Permitted The Jury To Decide Whether To Award "Enhanced Damages" To ExxonMobil*

SABIC next contends that the trial court erred by denying its motion for judgment as a matter of law as to the portion of the jury verdict that awarded "enhanced damages" to ExxonMobil.[83] The ground for this claim is that "no Saudi court would award enhanced damages in a contract case such as this one," because "enhanced damages are unprecedented in contract cases, even where the elements of *ghasb* are otherwise present."

SABIC presented that same argument to the trial judge, who concluded that "SABIC's argument that damages for *ghasb* are rarely awarded in the Saudi legal system and are virtually unprecedented[,] is unsubstantiated, unverifiable and irrelevant . . . ."[84] As the trial court explained:

> [S]imply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize stare decisis and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such

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[82] The trial court instructed the jury "that the tort of *ghasb* is comprised of the following elements: (a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully." *Saudi Basic Indus. Corp.*, 2003 WL 22016864 at *1 (Del. Super. Aug. 26, 2003).

[83] As previously noted, "enhanced damages" refers to $324 million of the total $416.8 damages award, which represents the profits realized by SABIC for using the overcharged amounts in its business.

[84] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *3 (Del. Super. Aug. 26, 2003).

> case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.[85]

SABIC makes no effort to confront the trial judge's reasoning in its briefs. Instead SABIC strives to create the impression that all the Saudi law experts, including Mr. Wolfson, agreed that a Saudi judge would be unlikely to award so-called "enhanced damages" in a contract action. That argument, besides being legally irrelevant, is factually wrong. A claim for *ghasb* lies in tort, not in contract. Mr. Wolfson testified that compensatory damages for the tort of *ghasb*, which includes repayment of both the actual overcharged amounts and the actual past profits obtained by SABIC's use of those amounts in its business operations, finds solid support in the Hanbali treatises. Even Dr. Vogel acknowledged that "the Hanbalis have made a point of . . . trying to pursue that usurper for all conceivable profits."[86] Accordingly, no basis has been shown for SABIC's claim that the trial court committed legal error by submitting the "enhanced damages" issue to the jury.

(e) The Claim That The Trial Court Instructed The Jury Erroneously On The Question of Enhanced Damages

SABIC's final argument is that it is entitled to a new trial on enhanced damages, [36] because the trial judge instructed the jury that it "may" award enhanced damages for

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[85] *Id.* at *2. The trial judge further observed "[b]y way of analogy [that] under U.S. law, punitive damages are rarely awarded, yet we do not instruct the jury about the frequency or lack of frequency of such awards." *Id.*

[86] *Id.* at 0066.

ghasb, yet provided no guidance to cabin the jury's discretion in awarding such damages. That "total lack of guidance," SABIC urges, was not only "prejudicial and reversible error," but also a denial of due process of law, because the instruction granted "unfettered . . . discretion . . . without any consideration by the jury of the factors that would be taken into account by a Saudi Court."

Implicit in SABIC's position, but never straightforwardly argued to us or to the trial court, is the premise that this case should never have been tried to, or decided by, a jury. We address that implicit premise first. Had SABIC taken this position frontally and from the outset of the case, that argument might have considerable force. The reason is that in an American jury trial, the division of labor between judges and juries does not readily lend itself to the *ijtihad* methodology that Saudi Arabian jurists are required to employ. A jurist deciding a case under Saudi law would have wide discretion that, as the Superior Court found, differs significantly from that which is normally vested in an American jury. A Saudi jurist is empowered—although not legally required—to consider all equities that might bear on what, if any, damages the Saudi jurist, unconstrained by American rules of evidence,[87] might choose to award.[88]

To put it in different terms, had SABIC brought this case in Saudi Arabia, the litigation would have been not unlike a proceeding in equity before a jurist having capacious authority to make factual and legal determinations, including shaping a remedy in accordance with the jurist's

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[87] For example, the Saudi jurist would not be constrained by D.R.E. 403, under which the trial judge in this case excluded evidence because its probative value was outweighed by its potential for prejudice.

[88] By way of example, as Mr. Wolfson testified, a Saudi adjudicator could (but would not be required to) take into account factors such as: (i) whether SABIC's conduct was intentionally harmful; (ii) whether, even if tortious, SABIC's conduct was not intended to deprive Yanpet or Kemya of their property; and (iii) whether any obligation SABIC had to restore any wrongful overcharges should be mitigated by the length of time ExxonMobil took to assert their claims.

sense of equity, circumscribed and influenced by the traditions of Islamic law that he would bring to bear on the dispute. In such a proceeding, the Saudi jurist would have had complete discretion to conclude that an award requiring SABIC to disgorge the profits it earned from the wrongfully retained overcharges was equitable. Unlike the division of labor inherent in an American jury trial, the Saudi jurist's application of *ijtihad*, and his resulting remedial decision, would not neatly divide between determinations of law and fact.

But, this case was not brought in Saudi Arabia. Instead, SABIC voluntarily brought this case in an American court of law, where SABIC knew there is a division of labor between the judge (whose duty is to determine the applicable law) and the jury (whose duty is to determine the facts). Nor did SABIC ever seek to avoid a jury trial at the outset of the case, which it could have done. Instead, SABIC waited until only a few weeks before the trial to file a motion to strike ExxonMobil's jury trial demand. Even then, the basis for SABIC's motion was not that a jury was inherently incapable of deciding Saudi law claims, but rather that the war in Iraq and the other events unfolding in the Middle East would prejudice the jury against SABIC. The trial judge denied that motion and SABIC's post-verdict motion for a new [37] trial (arguing the same ground). The trial court ruled that ExxonMobil was constitutionally entitled to have a jury decide its counterclaims. Moreover, the court had taken extraordinary precautions to identify, and to afford SABIC an opportunity to strike, any potentially prejudiced jurors.[89] SABIC has not challenged that ruling on appeal.

Having chosen an American forum whose adjudicatory processes SABIC knew were different from those of Saudi Arabia, SABIC cannot fault the trial court for having followed those procedures. That is especially true where, as

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[89] *Saudi Basic Indus. Corp.*, 2003 WL 22048238 (Del. Super.) at *1-*2.

here, SABIC presented the trial judge very little by way of helpful proposed instructions, and where the instructions it did propose were reasonably found to be not well grounded in Saudi law. Having rationally taken into account the unusual (from a Saudi law standpoint) procedural posture in which she was functioning, and having grounded her instructions to the jury upon a well-reasoned distillation of the Saudi principles articulated by the foreign law expert whose testimony she was entitled to credit, the trial judge did all that could have fairly been expected.

Turning to the specifics of SABIC's claim, our review of a challenged jury instruction focuses "'not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.'" Jury instructions "need not be perfect," but they "must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.'"[90] We conclude that the instruction given to the jury as to awardable *ghasb* damages satisfies those standards. The jury was instructed as follows:

> I will now explain to you an additional element of damages that you may award only if you find that SABIC is liable for usurpation, a claim I defined for you earlier.
>
> If you find in favor of Exxon or Mobil on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operation the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest.[91]

Any appellate determination of whether a jury was afforded sufficient guidance in exercising its fact-finding dis-

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[90] *Corbitt v. Tataguri*, 804 A.2d 1057, 1062 (Del. 2002) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)).

[91] *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *2 (Del. Super. Aug. 26, 2003).

cretion on a given issue, must necessarily depend upon the law that governs that issue and the instruction that the trial court gave (or refused to give) on that subject. In this case, the only specific request SABIC made to the trial court to furnish such guidance, was that the court instruct the jury on six factors that Mr. Wolfson suggested might possibly enter into a Saudi judge's perception of the equities in this case.[92] The trial judge declined [38] to give the requested instruction, for two reasons. The first was that the requested instruction did not represent established Saudi law; the second was that to give the requested instruction would likely confuse and mislead the jury. The trial court's analysis of these concerns, as reflected in her post-trial denial of SABIC's motion for judgment as a matter of law or, alternatively, a new trial on the damages issue, is thoroughly textured, well-reasoned, and, in our view, dispositive of SABIC's claim of error.

The trial judge's first reason for not instructing the jury on the six "Wolfson factors" was that they did not represent established Saudi law:

> It is important to place the six factors articulated by Mr. Wolfson in the proper context. It is clear from the context in which Mr. Wolfson offered this testimony that he was not stating that these factors were Saudi law, that the factors were exclusive, or that consideration of these factors was required. To

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[92] Those factors include: "(1) the court's perceptions as to the relative culpability of each party; (2) the lapse of time between the start of the alleged wrongful conduct and ExxonMobil's decision to file suit; (3) a desire to find the middle ground between competing litigants; (4) the sheer size of ExxonMobil's claim in terms of the absolute number of dollars at stake (and the attendant perception that awarding compensation above the principal amount might be 'too much'); (5) a desire to balance ExxonMobil's right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC and/or (6) a concern that ExxonMobil's decision to invoke the Islamic law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or lost profits in Saudi Arabia and, thus, should not be rewarded." *Saudi Basic Indus. Corp.*, 2003 WL 22016843 at *2 (Del. Super. Aug. 26, 2003).

> the contrary, these factors, according to Mr. Wolfson[,] are non-exclusive considerations that "*might possibly* enter into a Saudi judge's perception of the equities" in this case. Mr. Wolfson clearly opined that "[a] Saudi Arabian judge enjoys considerable discretion to rule in a manner leading to what he perceives as a fair and just result." . . . The Court did not find during the Saudi law hearing, nor does it find now, that Mr. Wolfson's list of factors reflects established Saudi law . . . based upon the authoritative texts . . . . The Court noted during the Saudi law hearing that Professor Hallaq and Dr. Vogel did not identify any such list of factors and there was no evidence to suggest that such a list of factors had ever been embraced by the Hanbali school. Nowhere in Dr. Vogel's pretrial affidavits or in his post-trial affidavits does he provide the Court with authority in the Hanbali texts or otherwise to support a jury instruction on these . . . factors. . . . [A]nd while the Court certainly considered Mr. Wolfson's list of factors in the context [in which] they were presented . . . the Court believed then, as it does now, that it would be error to instruct the jury on these factors. The Court did not want to supply to the jury an incomplete list of factors or suggest factors that, under Saudi law, are not "factors" embraced by the Hanbali school.[93]

The trial judge's second reason was that to instruct on those factors would confuse and mislead the jury:

> Moreover, the Court did not believe that the jury would be able to meaningfully engage in an analysis of each of the factors without creating tremendous confusion and uncertainty. This situation is a good example of the difficulty in applying Saudi law in a *jury* trial. A Saudi judge exercises tremendous dis-

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[93] *Id.* at *2 (italics in original, internal footnotes omitted).

cretion and is not bound by precedent. A Saudi judge is free to consider whatever evidence he feels is worth considering and disposing of any evidence he does not consider worthwhile. In other words, under the Saudi legal system, *Delaware Rule of Evidence 403* has no place. Here, the Court exercised its discretion in determining not only what the Saudi law is, but how it should be [39] explained to the jury. Obviously, many of the concepts of Saudi Arabian law are not easily understandable to a U.S. judge, much less a lay person in the United States. The Court in this case attempted to set forth the elements of the tort and convey to the jury in a clear, understandable manner the circumstances under which *ghasb* damages would be awardable. The Court could not present to the jury every conceivable circumstance under which *ghasb* damages could be awarded, nor could it tell the jury . . . that it is "rare" for juries to award damages for *ghasb* . . . . The factors Mr. Wolfson suggested are factors that a judge *could* analyze. The factors invite considerations that an American jury would not be permitted to consider, such as "a desire to find the middle ground between competing litigants," in other words, a compromise verdict or a consideration of the consequences of the jury verdict. Factor 5 may have prompted the jury to balance ExxonMobil's right to recover any wrongfully taken principal amounts against the *possibility* of undue hardship to SABIC. Such an instruction would invite inappropriate considerations by the jury having no place in deliberations and encourage the jury to engage in endless speculation about the "possible" undue hardship that SABIC might experience if ordered to pay damages. In addition, the Court was concerned that Factor 2 impermissibly injected into the case the issue of statute of limitations which the Court had ruled pretrial was contrary to Saudi law. To suggest to the jury that

> ExxonMobil's delay could be considered...when deciding whether or not to award damages for usurpation flies in the face of the Saudi substantive law which provides that property rights are eternal and cannot be extinguished by the passage of time.[94]

On appeal, SABIC argues that even if the trial court correctly refused to grant judgment to SABIC as a matter of law, the court should nonetheless have granted SABIC a new trial, because the jury was given no guidance on how to properly exercise its otherwise unfettered discretion. Given the difficult circumstances that confronted the trial judge, we cannot conclude that her jury instructions relating to *ghasb*, however succinct, subjected SABIC to any injustice that warrants reversal.

The jury was not given unbridled authority to do whatever it wished. The trial judge plainly instructed the jurors that they could not find for ExxonMobil unless "SABIC wrongfully exercised ownership or possessory rights over [their] property . . . without consent, which means with blatant or reckless disregard for those property rights." That is, the jury was told that SABIC's state of mind and conduct must have been far more culpable than an inadvertent breach of contract.[95] The jury was also instructed that they could, but need not, award additional damages beyond damages for breach of contract if they concluded that SABIC had committed *ghasb*. And, if, in that event, the jury made a discretionary decision to award additional damages, the trial judge cabined that discretion by limiting any additional award to "any profits you may determine SABIC derived by using in its operations the money, if any, that was usurped . . . " These instructions flowed from the trial judge's legal determination, based upon Saudi law principles well [40] grounded in the expert testimony that she accepted, that if

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[94] *Id.* (italics in original, internal footnotes omitted).

[95] The jury was told that, at a bare minimum, it must find that SABIC acted with "reckless disregard" for ExxonMobil's rights.

the jury found that SABIC committed *ghasb* as she defined it, an award of damages so limited would do justice.

If the trial judge, based upon the identical record, had reached the same result in a bench trial as the jury did in this trial, SABIC would have had no ground to attack that result as contrary to law or equity. By parity of reasoning, the verdict reached by the jury here—a product of the combined effort of the jurors and of the trial judge who circumscribed the jury's discretion in accordance with her application of *ijtihad*—affords SABIC no independent basis for reversal.[96] To the extent SABIC suggests that the result would have been different had the case been litigated in Saudi Arabia, that argument, even if true, has no greater merit than would the argument that a jury verdict should be set aside because another jury would have decided the case differently, or that an equitable decree should be set aside because another chancellor might have crafted a different remedy. Arguments of that kind have never, for good and obvious reason, found favor under our law, and they find no favor here.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court awarding damages to ExxonMobil, and against SABIC, is affirmed. The mandate shall issue forthwith.

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[96] Even if the trial judge's instructions were regarded as giving the jury an implicitly binary choice regarding damages—*i.e.*, to award damages as she formulated them or to award no additional damages beyond damages for breach of contract—that binary choice worked no fundamental unfairness upon SABIC. For a jury to find that a party that recklessly disregarded the property rights of another should be required to disgorge all profits it wrongly obtained, is hardly alien to our tradition. Nor would be an order requiring full disgorgement by a party committing tortuous conduct inconsistent with Saudi law. In large measure, SABIC's argument reduces to a contention that the trial judge erred by not instructing the jury that it could, based on some generalized sense of equity, award partial, rather than full, disgorgement, once it found that additional damages for *ghasb* were warranted.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	§	
Appellant,	§	No. 493, 2003
v.	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
MOBIL YANBU PETROCHEMICALS COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	§	C.A. No. 00C-07-161
Appellee.	§	

Before HOLLAND, BERGER, STEELE and JACOBS, Justices, constituting the qualified and available members of the Court *en banc*.

ORDER

The appellant, Saudi Basic Industries Corporation ("SABIC"), having filed a Motion for Remand and a Motion for Acceptance into the Appellate Record, both relating to the Saudi Arabian Government's Official Statement of Saudi Law, and the Court, having considered the motions and the responses thereto,

IT IS ORDERED this 29th day of January, 2004, that SABIC's motions are hereby DENIED.

BY THE COURT:

/s/ Carolyn Berger
Justice

APPENDIX C

Superior Court of Delaware

SAUDI BASIC INDUSTRIES CORPORATION,
Plaintiff/Counterclaim Defendant,
v.
MOBIL YANBU PETROCHEMICAL COMPANY, INC. and Exxon Chemical Arabia, Inc.,
Defendants/Counterclaim Plaintiffs.

No. Civ.A. 00C-07-161JRJ

Submitted June 3, 2003
Decided Aug. 26, 2003

[2003 WL 22016864]

Upon SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's *Ghasb* Claims—Denied.

ORDER

JURDEN, J.

[1] Upon review of SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's *Ghasb* Claims, ExxonMobil's opposition thereto, and the record, it appears to the Court that:

1. SABIC again asks the Court to enter judgment as a matter of law with respect to ExxonMobil's *ghasb* claim "because there is no legally sufficient evidentiary basis for a reasonable jury to find for Exxon or Mobil."[1] In the alternative, SABIC asks this Court to grant a new trial "because

[1] SABIC Br. Supp. Renewed Mot. J. Matter Law, Alternative New Trial ExxonMobil's *Ghasb* Claims at 1 [hereinafter SABIC Opening Br.].

the evidence overwhelmingly supports a verdict in favor of SABIC."[2]

2. SABIC made a conscious, strategic decision to file this case here rather than in its own backyard. That risky strategy backfired, miserably, and now SABIC cries foul claiming that an American judge cannot possibly adjudicate like a Saudi judge. For the reasons set forth below, the Court finds no basis to alter its decision on the elements of *ghasb* and therefore denies SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial on this issue.

3. Judgment as a matter of law pursuant to *Superior Court Civil Rule 50* is appropriate only when "reasonable minds could draw but one inference and that inference is that verdict favorable to plaintiff is not justified."[3]

In contrast, when considering a motion for a new trial, the court weighs the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached. Barring exceptional circumstances, the trial judge should set aside a jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand. This standard gives recognition to the exclusive province of the jury as established by the Delaware Constitution, while preserving the separate common law function of the motion for a new trial where all of the evidence can be reviewed from the unique viewpoint of the trial judge. A trial judge's determination to grant a new trial is accorded due deference by this Court and will not be disturbed so long as the decision is not unreasonable or capricious.[4]

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[2] *Id.*

[3] *Burgos v. Hickock*, 695 A.2d 1141, 1144 (Del. 1996).

[4] Jury Instructions, *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc.*, No. OOC-07-161, Jur-

4. In support of its motion, SABIC argues, *inter alia*, that the *ghasb* verdict in favor of ExxonMobil is deficient as a matter of law because the Court did not properly instruct the jury on the elements of *ghasb* (usurpation) under Saudi law.

5. The Court instructed the jury as follows:

I will now instruct you on the elements of Mobil's and Exxon's claims for usurpation [*ghasb*]. Mobil and Exxon claim that SABIC is liable for usurping the money that YANPET and KEMYA paid to SABIC for UNIPOL® technology in excess of what SABIC paid to Union Carbide for that technology. SABIC denies that it is liable for usurpation. In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.[5]

[2] 6. As noted above, the Court instructed the jury that the tort of *ghasb* is comprised of the following elements: (a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully.[6]

SABIC vehemently disagrees with the Court's definition of "without consent" and claims that the Court omitted the necessary element of force in its instruction.[7]

7. The jury instruction in question was the culmination of many months of study, research, discussion and extensive expert testimony on Saudi law. Long before trial, the parties' Saudi law experts disagreed on the proper elements of *ghasb* and the Court was unable to reconcile the

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den, J. (No. 578); Trial Tr. Afternoon Session (Mar. 20, 2003) at 20-21 (No. 592).

[5] Jury Instructions at 19, *Saudi Basic Indus. Corp.* (No. 578).

[6] Trial Tr. Afternoon Session (Mar. 20, 2003) at 20-21, *Saudi Basic Indus. Corp.* (No. 592).

[7] *See* SABIC Opening Br. at 11; SABIC Reply Br. at 16.

parties' experts' opinions. Consequently, the Court determined that it was necessary to hire its own independent expert pursuant to Delaware Uniform Rule of Evidence 706.[8] The parties agreed. The Court asked each side to submit names of three experts. The Court then permitted each side to comment on the other's proposed experts. After considering all the various objections lodged, the Court decided to locate its own expert.

8. The Court located Mr. Herbert Wolfson, and provided his qualifications to the parties for their comment. The Court discussed with the parties at great length what issues it wanted Mr. Wolfson to research. The Court then issued an order appointing Mr. Wolfson and describing his role in the litigation.[9]

9. Mr. Wolfson prepared two reports,[10] and the parties took his deposition. After reviewing all the experts' reports and their deposition testimony, the Court held a hearing at which all experts testified and were subject to cross examination.[11] Following this hearing, the Court ruled on the proper elements of *ghasb*.[12]

10. SABIC claims that the Court erred when it refused to instruct that SABIC must have acted "forcefully" and

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[8] Hr'g Tr. Afternoon Session (Dec. 19, 2002) at 219-23, *Saudi Basic Indus. Corp.* (No. 376).

[9] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc.*, No. OOC-07-161, Jurden, J. (Jan. 30, 2003) (order appointing Herbert S. Wolfson as an independent expert to assist the Court). *See* Del. Unif. R. Evid. 706.

[10] Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003), *Saudi Basic Indus. Corp.* (No. 518); Supp. Rep. Indep. Expert Herbert S. Wolfson (Mar. 6, 2003), *Saudi Basic Indus. Corp.* (No. 517).

[11] Tr. Saudi Law Hr'g Morning Session (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 533); Tr. Saudi Law Hr'g Afternoon Session (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 623).

[12] Tr. Saudi Law Bench Ruling (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 524).

with the victim's knowledge.[13] According to SABIC, these two elements preclude any *ghasb* (or usurpation) by secrecy or stealth. Further, according to SABIC, because these two elements "were not put to the jury, the verdict in favor of Exxon and Mobil is unsupportable as a matter of law."[14]

11. In support of this argument, SABIC has submitted, post trial, another affidavit from its Saudi law expert, Frank E. Vogel.[15] Dr. Vogel justifies the need for a post-trial affidavit, stating:

> It is indeed unfortunate that, despite the tremendous expenditure of time and effort on expert opinions and testimony as to Saudi law, errors of the magnitude one observes in this case could persist. In this report, I hope to reiterate the facts about Saudi law in a clearer fashion than I may have achieved before, in the hopes that these errors might still be rectified.[16]

12. The Court notes that SABIC had ample opportunity *before* trial to submit full briefing and supporting affidavits from experts on Saudi law and that Dr. Vogel's attempt to "reiterate" Saudi law "in a clear fashion" comes far

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[13] SABIC's Opening Br. at 3-6.

[14] SABIC's Opening Br. at 4.

[15] Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-4, Aff. Frank E. Vogel (April 4, 2003), *Saudi Basic Indus. Corp.* (No. 640). The Court was surprised by the submission of such an affidavit *after* trial considering the Saudi law issues were fully briefed (with supporting affidavits), months before trial. In fact, it was SABIC who requested a pretrial determination of Saudi law. *See* SABIC's Mot. Pretrial Determination Saudi Law & Bifurcate Trial Liability & Damages (Dec. 9, 2002), *Saudi Basic Indus. Corp.* (No. 329). The Court is astounded, given the extensive briefing on the Saudi law issues, and the fact that any affidavits pertaining to the interpretation of Saudi law should have been submitted, at the latest, by January 24, 2003, the day SABIC's reply brief on its Saudi law motion was filed, that SABIC is attempting to supplement the record *post trial* in this manner.

[16] Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-4, ¶ 4, Aff. Frank E. Vogel (April 4, 2003), *Saudi Basic Indus. Corp.* (No. 640).

too late. The parties were to thoroughly research and brief the Saudi law issues in advance of the hearing conducted by the Court on March 7, 2003. The Court held a full one (1) day hearing on the Saudi law issues during which the parties were able to cross examine each other's experts and the Court appointed expert. Now, months after the trial and many more months after the Saudi law hearing, SABIC attempts to supplement the record through Dr. Vogel's new affidavit. The Court is reluctant to consider this affidavit because of its untimeliness, but will do so in the interest of justice. To be fair, the Court will also consider Dr. Hallaq's post trial declaration.

[3] 13. After careful consideration, the Court finds nothing in Dr. Vogel's April 14, 2003 affidavit or Dr. Vogel's June 4, 2003 rebuttal affidavit which would cause the Court to alter its decision on the elements of *ghasb* under Saudi law. Prior to ruling on the elements of *ghasb*, the Court carefully reviewed voluminous expert reports and supporting information, deposition transcripts, appointed an independent expert and presided over a one (1) day hearing at which the Saudi law experts testified. It was clear even before the Saudi law experts testified that there is no single definition of *ghasb* under Saudi law. It was also clear before the Saudi law experts took the stand that all three differed on the proper elements of a *ghasb* claim. The decision of what elements comprise the tort of *ghasb* under Saudi law was extremely difficult. This difficulty was caused, in large part, by the fact that the concept of *stare decisis* has no place in Saudi law. All the Saudi law experts who testified agreed that the Islamic Legal System in Saudi Arabia is based on "juristic or scholarly opinion, rather than on the precedential authority of court decisions or on extensive legislation or codification."[17] Moreover, Saudi court decisions are not pub-

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[17] Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶ 5, Aff. Frank E. Vogel (Sept. 16, 2002), *Saudi Basic Indus. Corp.* (No. 640).

lished or open to public inspection.[18] It is not possible to open up law books and read cases to discern the law. Consequently, ascertaining the proper elements of the tort of *ghasb* under Saudi law was an extremely challenging and drawn out process.[19]

14. The basic law of Saudi Arabia is Islamic law. It is that law which "determines both the constitution and the general or common law of the Kingdom."[20] Although there are four schools of Sunni Islamic jurisprudence which set forth the content of Islamic Law, Saudi judges are trained in the Hanbali School and usually follow the majority view of that school.[21] There can, however, be multiple views on any issue within the Hanbali School.[22] And, "despite the instruction to apply Hanbali teachings, Saudi judges can and sometimes do look to the teachings of other guilds."[23]

15. The Saudi law experts agreed that the process of *ijtihad* is central to the judges role in the Saudi legal system. The Court's expert, Mr. Wolfson, describes *ijtihad* as the "derivation of legal rules through study, research and analysis."[24] Because there is no stare decisis, *ijtihad* must be conducted, from scratch, each time a question requiring a legal ruling is presented.[25] According to Mr. Wolfson, efforts to look towards past practice as a guide to possible future outcomes may well be inherently at odds with Islamic law's doc-

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[18] *See id* ¶ 9.

[19] *See* Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) 14- 26, *Saudi Basic Indus. Corp.* (No. 518).

[20] Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶ 5, Aff. Frank E. Vogel (Sept. 16, 2002), *Saudi Basic Indus. Corp.* (No. 640).

[21] *Id.* ¶ 7.

[22] *See id.*

[23] Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) ¶ 24, *Saudi Basic Indus. Corp.* (No. 518).

[24] *Id.* ¶ 23.

[25] *Id.*

trinal insistence on the use of *ijtihad* to derive the appropriate legal rule governing each individual case.[26] *Ijtihad*, according to Mr. Wolfson, may lead to different scholars reaching different results at different times, even on similar questions. Such different results are viewed as acceptable so long as the proper analytical procedures are followed in reaching the results.[27]

[4] 16. Mr. Wolfson opined that there is no single binding definition of *ghasb*, "but rather a range of possibilities."[28] Dr. Vogel testified that he agreed with Mr. Wolfson that there is "no single binding definition of usurpation [or *ghasb*]."[29]

17. The Court took every measure it could to learn the pertinent Islamic law and to understand how a Saudi judge might apply it to the dispute at hand. When the Court's expert indicated he might be able to offer more assistance on the Saudi law issues presented if he traveled to Saudi Arabia, the Court, after consultation with the parties, authorized Mr. Wolfson to do so. The Court employed the ijtihad process as best it could under the circumstances and properly "navigat[ed] within the boundaries of the Hanbali school."[30] In rejecting the "knowledge" and "force" elements, the Court's instruction on *ghasb* is consistent with the classical Hanbali authorities that would be followed by a Saudi judge.[31]

18. ExxonMobil points out that Dr. Vogel's "varying and inconsistent" definitions of *ghasb* only confirm that there is no one correct definition. The Court is inclined to agree.

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[26] *Id.*

[27] *Id.* ¶ 17.

[28] *Id.* ¶ 52.

[29] Tr. Saudi Law Hr'g Morning Session (Mar. 7, 2003) at 127, *Saudi Basic Indus. Corp.* (No. 533).

[30] *Id.* at 77-78.

[31] *Id.* at 40-44, 47, 53.

Each time he opined on the subject, Dr. Vogel's definition on *ghasb* seemed to change.[32]

19. The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of Islamic law. His relentless attacks on Dr. Hallaq's qualifications and expertise further undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.

20. What troubles the Court even more is that Dr. Vogel opines that this Court cannot credibly engage in the ijtihad process.[33] According to Dr. Vogel, "*ijtihad* requires for its credibility qualifications which, on the very face of things, neither Prof. Hallaq, myself, or, with respect, any U.S. Court possesses."[34] If Dr. Vogel is correct, why then did SABIC choose to file this dispute in a United States Court? If Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then *what* Saudi law "expert" would be able to assist this United States Court in determining the applicable Saudi law?

21. According to Dr. Vogel, this Court was required to "strive to predict what the Saudi legal system would actually routinely do"[35] under these particular circumstances. This Court did just that—without the benefit of reported decisions from Saudi Arabia and despite conflicting opinions from well credentialed Islamic law scholars.

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[32] *See, e.g.*, ExxonMobil Br. Opp'n at 13-15.

[33] *See* Rebuttal Aff. Frank E. Vogel Concerning Mot. J. Matter Law (June 4, 2003), *Saudi Basic Indus. Corp.* (No. 690).

[34] *Id.* ¶ 7.

[35] *Id.* ¶ 8.

22. It is remarkable that SABIC, having purposely selected this forum instead of a Saudi Court,[36] knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that no American Judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.[37]

[5] 23. Contrary to SABIC's arguments, the verdict in this case was not against the great weight of the evidence. In fact, ExxonMobil introduced ample evidence in support of each element of its *ghasb* claim. Had it not done so, the Court would not have allowed ExxonMobil to introduce evidence of the damages recoverable for *ghasb*.[38] As ExxonMobil notes in its Answering Brief, the record is replete

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[36] SABIC initiated a declaratory judgment suit on July 24, 2000. See Initial Complaint, *Saudi Basic Indus. Corp.* (No. 1). The Court later reversed the order of proof, thereby making ExxonMobil the plaintiff. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc.*, No. OOC-07-161, Jurden, J. (Jan. 24, 2003) (granting ExxonMobil's motion to realign the order of proof for trial presentation to promote efficiency, conserve the parties' and the Court's resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion.

[37] *See* SABIC's Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 305); SABIC's Br. Supp. Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 306); SABIC's Reply Br. Supp. Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 347).

[38] Tr. Saudi Law Bench Ruling (Mar. 7, 2003) at 8, *Saudi Basic Indus. Corp.* (No. 524). The Court ruled:

> I find that ExxonMobil may proceed under the theories set forth in its counterclaim but may not introduce evidence of what its termed "benefit damages," any damages over and above the principal amount *until and unless the Court makes a finding at the conclusion of its liability case that ExxonMobil has satisfied the above elements of usurpation as I have determined them to be*, and that is to avoid the problem raised by [SABIC] of not being able to un-ring the bell. I don't want the jury to hear evidence of over $300 million worth of damages that would not be available if ExxonMobil doesn't satisfy its burden. (Emphasis added.) *Id.*

with evidence supporting each element of *ghasb*. The verdict is consistent with that evidence and is the product of a reasonably prudent jury. The Court will not disturb the jury verdict because it is not manifestly and palpably against the great weight of the evidence.

WHEREFORE, for the reasons above, SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's *ghasb* claims is DENIED.

IT IS SO ORDERED

APPENDIX D

Superior Court of Delaware

SAUDI BASIC INDUSTRIES CORPORATION,
Plaintiff/Counterclaim Defendant,
v.
MOBIL YANBU PETROCHEMICAL COMPANY, INC. and Exxon Chemical Arabia, Inc.,
Defendants/Counterclaim Plaintiffs.

No. Civ. A. 00C-07-161JRJ

Submitted June 3, 2003
Decided Aug. 26, 2003

[2003 WL 22016843]

Upon SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's *Ghasb* Claims—Denied.

ORDER

JURDEN, J.

[1] AND NOW, TO WIT, this 26th day of August, 2003, upon consideration of the briefs and the record, it appears to the Court that,

1. Pursuant to Superior Court Civil Rule 50(b), SABIC moves for judgment as a matter of law with respect to the $324 million "enhanced damages" award which followed the jury verdict for ExxonMobil on *ghasb*, the Saudi law tort of usurpation. In the alternative, SABIC moves for a new trial pursuant to Superior Court Civil Rule 59(b), and/or remit-

tur, claiming that the evidence "wholly fails" to support the jury's "enhanced" damages award. [1]

2. The $324 million award which SABIC refers to as "enhanced damages" is the difference between the $92 million award reflecting Exxon's and Mobil's pro rata shares of the overcharges for the Unipol® PE Technology and the $416 million gross award, and represents half of the disgorged profits ExxonMobil established SABIC earned through its use of the $184 million overcharge.[2]

3. SABIC claims that under Saudi law $324 million in *ghasb* damages is "entirely precluded because ExxonMobil introduced no evidence whatsoever that the purportedly 'usurped' $92 million was not commingled with other monies belonging to SABIC."[3]

4. SABIC alleges that the "disgorged-profits enhanced-damages remedy is only theoretically available, but virtually never used ... in Saudi Arabia and, even then, may only be available for *ghasb* claims *and* only under the most unusual or egregious of circumstances."[4] According to SABIC, "enhancement is entirely precluded under governing Saudi law" in this case.[5] SABIC claims that unless a particular increase or gain can be "*directly traced*" to the specific funds usurped, a plaintiff cannot recover enhanced damages on a *ghasb* claim. Thus, according to SABIC, even if the plaintiff establishes the elements of *ghasb*, if the monies have been commingled, "enhanced damages" are not allowed. SABIC asserts that this is so because under Saudi law usury is prohibited and damages may not be in any way speculative.[6]

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[1] SABIC's Br. Supp. Renewed Mot. J. Matter Law, Alternative New Trial or Remittur, on ExxonMobil's Enhanced Damages at 1 [hereinafter SABIC's Opening Br.]

[2] SABIC's Opening Br. at 1.

[3] *Id.*

[4] SABIC's Opening Br. at 4 (emphasis in original).

[5] *Id.* at 5.

[6] *Id.* at 5-6.

5. SABIC's arguments ignore the simple truth that the circumstances under which *ghasb* (usurpation) damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis*.[7] Contrary to the implication of SABIC's briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for, the Saudi law tort of *ghasb*. Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghasb*. To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of *ghasb*. It is clear to the Court that, had the Court appointed two or three Saudi law experts, it would have received two or three different opinions. Finally, because Saudi law decisions are not published, even if the decisions had precedential value (which all the experts agree they do not), the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.

[2] 6. When faced with the daunting task of determining the elements of *ghasb* and the damages available for this tort, the Court, weighing the credibility of each Saudi law expert, exercised, as best it could under the circumstances, *ijtihad*, to reach the "right" result.[8]

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[7] On this point, all the Saudi law experts who testified agree. See Rep. Indep. Expert Herbert S. Wolfson (February 21, 2003) (Doc. No. 518) ¶ 23 ("Islamic law resists the concept of precedent and *stare decisis*, and this doctrinal hostility has been incorporated into the Saudi Arabian legal system."); Tr. Saudi Law Hr'g Morning Session (March 7, 2003) at 26-29 (Doc. No. 533) (Testimony of Prof. Hallaq); *Id.* at 117-25 (Testimony of Dr. Vogel).

[8] See Tr. Saudi Law Hr'g Morning Session (March 7, 2003) at 20 (Prof. Hallaq stated, "every time a Muslim judge does this *[ijithad]*, it is basically his best way, his best effort to find what is the right thing to do"; Volume Three Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-16, Dep. Tr. Of Herbert S. Wolfson

7. In the Court's view, Jury Instruction 6.4 (Damages for Usurpation) is the product of the Court's exercise of *ijithad*, is not contrary to Saudi law as interpreted by the Hanbali School, and is consistent with Dr. Hallaq's and Dr. Wolfson's testimony and the unique facts of this case.[9] Notably, SABIC's expert, Dr. Vogel, the only Saudi law expert who disagreed with the recoverability of damages for usurpation, acknowledged during cross examination at the Saudi law hearing that a bad-faith breach of contract could "easily lead" a Saudi judge "to augment the quantum of damages awarded" without mention of a tracing requirement.[10]

8. The Court, after reviewing the Saudi law experts' reports and listening to all the testimony of the Saudi law experts, determined that, contrary to Dr. Vogel's opinion and SABIC's arguments, Saudi law does not impose a requirement on plaintiff, under the facts proven by ExxonMobil at trial, to "trace" the damages.[11]

9. For the reasons articulated in ExxonMobil's answering brief,[12] Dr. Vogel's post trial affidavit does not change the Court's view on the propriety of the *ghasb* damages instruction.

(March 6, 2003) (Mr. Wolfson stated that a Saudi judge performing *ijithad* tries to do the "right thing").

[9] *See e.g.*, Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-7 ¶ 17, Expert Rep. Wael B. Hallaq (Sept. 12, 2002); Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) ¶ 89.

[10] *See* Tr. Saudi Law Hr'g Morning Session at 152-53.

[11] Prof. Hallaq and Mr. Wolfson both opined, (and more credibly, in the Court's view, then Dr. Vogel,) on the availability of *Ghasb* damages. Contrary to Dr. Vogel's opinion, both opined that such damages are available without regard to whether the plaintiff can specifically trace funds to particular profits. *See* Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-7 ¶ 17 (Expert Rep. Wael B. Hallaq (Sept. 12, 2002); Rep. Indep. Expert Herbert S. Wolfson ¶ 89.

[12] ExxonMobil Br. Opp'n at 10-14.

10. SABIC argues that Jury Instruction 6.4 led the jury to believe that "an enhanced damage award follows automatically and as a matter of course if the elements of *ghasb* are established."[13]

11. As noted above, the Court is satisfied that Jury Instruction 6.4 is not violative of Saudi law and is appropriate under the particular facts of this case. In fact, Jury Instruction 6.4 expressly left an award of usurpation damages to the jury's discretion:

> If you find a favor of Exxon or Mobil on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operation the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest.

12. SABIC also argues that the Court should have instructed the jury on the six factors that Mr. Wolfson suggested "might possibly" enter into a Saudi judge's perception of the equities" in this case.[14] SABIC argues that each

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[13] SABIC's Opening Br. at 10. *See also*, ExxonMobil Br. Opp'n at 14.

[14] SABIC's Opening Br. at 12-13. These factors include:

1. the court's perceptions as to the relative culpability of each party.

2. the lapse of time between the start of the alleged wrongful conduct and ExxonMobil's decision to file suit;

3. a desire to find the middle ground between competing litigants;

4. the sheet size of ExxonMobil's claim in terms of the absolute number of dollars at stake (and the attendant perception that awarding compensation above the principal amount might be "too much"),

5. a desire to balance ExxonMobil's right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC, and/or

6. a concern that ExxonMobil's decision to invoke the Islamic law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or lost profits in Saudi Arabia and, thus, should not be rewarded.

of these factors "conclusively favor SABIC" but the Court should award a judgment as a matter of law. Alternatively, SABIC argues that the Court should have instructed the jury as to each of these factors and because it did not SABIC is entitled to a new trial.[15] It is important to place the six factors articulated by Mr. Wolfson in the proper context. It is clear from the context in which Mr. Wolfson offered this testimony that he was not stating that these factors were Saudi law, that the factors were exclusive or that consideration of these factors was required. To the contrary, these factors, according to Mr. Wolfson are non-exclusive considerations that "*might possibly* enter into a Saudi judge's perception of the equities" in this case.[16] Mr. Wolfson clearly opined that "[a] Saudi Arabian judge enjoys considerable discretion to rule in a manner leading to what he perceives as a fair and just result."[17] He further testified that the basis for this list of factors was discussions he had with a Saudi lawyer during his trip to Riyadh. The Court did not find during the Saudi law hearing, nor does it find now, that Mr. Wolfson's list of factors reflects established Saudi law, much less a studied analysis of Saudi law based upon the authoritive texts. In the Court's view, this testimony was offered to provide the Court with some considerations that it could take under advisement in exercising its considerable discretion to rule in a manner that resulted in a fair and just decision. The Court noted during the Saudi law hearing that Professor Hallaq and Dr. Vogel did not identify any such list of factors and there was no evidence to suggest that such a list of factors had ever been embraced by the Hanbali School. Nowhere in Dr. Vogel's pretrial affidavits or in his post-trial affidavits does he provide the Court with authority

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Supp. Rep. Indep. Expert Herbert S. Wolfson (March 6, 2003) (Doc. No. 517) ¶ 36.

[15] SABIC's Opening Br. at 12-13.

[16] Supp. Rep. Indep. Expert Herbert S. Wolfson (March 6, 2003) ¶ 36 (emphasis added).

[17] *Id.*

in the Hanbali texts or otherwise to support a jury instruction on these six factors. While the Court certainly appreciated Mr. Wolfson's attempt to offer some guidance to the Court on what types of considerations it could take into account in determining what damages would be recoverable for the tort of *ghasb*, and while the Court certainly considered Mr. Wolfson's list of factors in the context they were presented to the Court, the Court believed then, as it does now, that it would be error to instruct the jury on these factors. The Court did not want to supply to the jury an incomplete list of factors or suggest factors that, under Saudi law, are not "factors" embraced by the Hanbali School. Moreover, the Court did not believe that the jury would be able to meaningfully engage in an analysis of each of the factors without creating tremendous confusion and uncertainty. This situation is a good example of the difficulty in applying Saudi law in a jury trial. A Saudi judge exercises tremendous discretion and is not bound by precedent. A Saudi judge is free to consider whatever evidence he feels is worth considering and disposing of any evidence he does not consider worthwhile. In other words, under the Saudi legal system, *Delaware Rule of Evidence 403* has no place. Here, the Court exercised its discretion in determining not only what the Saudi law is, but how it should be explained to the jury. Obviously, many of the concepts of Saudi Arabian law are not easily understandable to a U.S. judge, much less a lay person in the United States. The Court in this case attempted to set forth the elements of the tort and convey to the jury in a clear, understandable manner the circumstances under which *ghasb* damages would be awardable. The Court could not present to the jury every conceivable circumstance under which *ghasb* damages could be awarded, nor could it tell the jury, based on information available to it, that it is "rare" for juries to award damages for *ghasb*. In the Court's view, neither instruction would have been appropriate. The factors Mr. Wolfson suggested are factors that a judge *could* analyze. The factors invite considerations that an American jury would not be permitted to consider, such as "a desire to find the middle ground between compet-

ing litigants," in other words, a compromise verdict or a consideration of the consequences of the jury's verdict. Factor 5 may have prompted the jury to balance ExxonMobil's right to recover any wrongfully taken principal amounts against the *possibility* of undue hardship to SABIC. Such an instruction would invite inappropriate considerations by the jury having no place in deliberations and encourage the jury to engage in endless speculation about the "possible" undue hardship that SABIC might experience if ordered to pay damages. In addition, the Court was concerned that Factor 2 impermissibly injected into the case the issue of statute of limitations which the Court had ruled pretrial was contrary to Saudi law. To suggest to the jury that ExxonMobil's delay in asserting its rights under the contract could be considered by it when deciding whether or not to award damages for usurpation flies of the face of the Saudi substantive law which provides that property rights are eternal and cannot be extinguished by the passage of time. SABIC calls the usurpation damages "extraordinary relief." It makes this claim based on Dr. Vogel's testimony alone. There are no authoritative texts cited to the Court by any expert that convince the Court that the jury's award of usurpation damages under these particular circumstances was inappropriate or violative of Saudi law. Moreover, simply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize stare decisis and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the

primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.[18] Thus, whether a usurpation damages award is unprecedented is utterly meaningless given the obligation of any judge employing Saudi law to exercise *ijithad* in a particular case and under a legal system which resists the concept of precedent and *stare decisis*. By way of analogy, under U.S. law, punitive damages are rarely awarded, yet we do not instruct the jury about the frequency or lack of frequency of such awards.

[3] 13. SABIC's argument that damages for *ghasb* are rarely awarded in the Saudi legal system and are virtually unprecedented is unsubstantiated, unverifiable and irrelevant in the Court's view. The Court finds that there is a legally sufficient evidentiary basis for a reasonable jury to find that ExxonMobil established by a preponderance of the evidence the elements of *ghasb*. The Court instructed the jury that if ExxonMobil proved the elements of *ghasb*, the jury "may" award damages in addition to any amount awarded for breach of contract "based upon any profits you may determine SABIC derived by using in its operation" the usurped money. The Court specifically instructed the jury, consistent with Saudi law, that any damages awarded for usurpation "may not include any interest." The jury verdict is not against the great weight of the evidence and the Court finds no error in the jury instructions relating to the award of damages for *ghasb*. Consequently, the Court denies SABIC's Renewed Motion for Judgment as a Matter of Law and will not grant remittur or a new trial.

IT IS SO ORDERED.

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[18] *See* Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶ 8 (Aff. Frank E. Vogel (Sept. 16, 2002); Saudi Law Hr'g Morning Session at 30-31 (Prof. Hallaq's testimony).

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION,

Plaintiff,

v. C.A. No. 00C-07-161 JRJ

MOBIL YANBU PETROCHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,

Defendants.

BEFORE: THE HONORABLE JAN R. JURDEN, J.

TRANSCRIPT OF PROCEEDINGS
JUDGE'S RULING
MARCH 07, 2003

* * *

[3] March 07, 2003
Courtroom 8C
9:20 a.m.

PRESENT:

As noted.

THE COURT: I fervently hope this is the hardest part of the case, and that the trial will be a walk in the park. By saying that I guess I have tipped my hand. I'm denying ExxonMobil's motion for summary judgment for reasons I'll get to in just a moment.

Let me just start by saying that I think it's undeniable and obvious the difficulties that are presented by the fact that there are no juries in Saudi Arabia, and that there's no risk of confusion or unfair prejudice from allowing parties to a contract to put forth any and all evidence, extrinsic included, that they believe is relevant in determining the meaning of the contract and then the Saudi judge, as we have heard from the various experts, sorts through what he thinks is important and rules.

* * *

[6]

* * *

With respect to the tort of usurpation I find the elements of usurpation to be as follows:

One, the exercise of ownership or possessory rights.

Two, over property of another.

Three, without consent.

Four, wrongfully.

Now, I have omitted the requirement introduced by some of the scholars and the experts of open and notorious, and I believe the omission of that is in following the haubali rules.

[7] In the absence of reported case law and any ability to get a meaningful insight or idea as to how even the majority of Saudi judges might approach this particular element not in the haubali code I need to rely on scholarly—excuse me, only not in haubali code, I'm going to rely on what is in the haubali code, and I am going to fall back to that treatise because I think in an abundance of caution and not knowing how any particular Saudi judge might rule on any particular day, I think that's the most prudent way to proceed.

I am satisfied that knowledge and intent with respect to the tort of usurpation is only relevant to the sinfulness, not of the tort itself, but with respect to the element of without consent, the lack of consent, there's been much debate over what that means, not as much as what the debate has been

over open and notorious, but I believe that in this case the without consent element requires a showing of blatant or reckless disregard for the property rights of another.

So while it does not need to be intentional, I do find there is something more required than, say, [8] in a regular breach of contract case. And I believe that it's consistent with and does not do violence to the haubali sources to say that a blatant or reckless disregard for the property rights of another is what is required.

I find that ExxonMobil may proceed under the theories set forth in its counterclaim but may not introduce evidence of what its termed "benefit damages," any damages over and above the principal amount until and unless the Court makes a finding at the conclusion of its liability case that ExxonMobil has satisfied the above elements of usurpation as I have determined them to be, and that is to avoid the problem raised by Mr. Adamo of not being able to unring the bell. I don't want the jury to hear evidence of over $300 million worth of damages that would not be available if ExxonMobil doesn't satisfy its burden.

* * *

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	§	
Plaintiff Below, Appellant,	§	No. 493,2003
v.	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
MOBIL YANBU PETROCHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	§	C.A. No. 00C-07-161
Defendants Below, Appellees.	§	

Submitted: February 8, 2005
Decided: February 22, 2005

Before STEELE, Chief Justice, HOLLAND, BERGER and JACOBS, Justices, and STRINE, Vice Chancellor,[1] constituting the Court *en Banc*.

ORDER

This 22nd day of February 2005, upon consideration of the Appellant's moving papers and the Appellees' response thereto, and the record in the case, it appears to the Court that:

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[1] Sitting by designation pursuant to Art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

1. The Appellant, Saudi Basic Industries Corp. ("SABIC"), has moved for reargument *en banc* from this Court's January 14, 2005 Opinion affirming the Superior Court jury verdict and judgment against SABIC, awarding $416.8 million in damages to Appellees, Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc. ("ExxonMobil").

2. To prevail on a motion for reargument, the moving party must show that in rendering its decision, the Court misapprehended a material fact or rule of law.[2] SABIC's motion fails to satisfy that standard, and amounts essentially to a rehash of contentions (now recast as federal constitutional law claims) that this Court has previously considered and rejected.[3]

3. SABIC advances five grounds for seeking reargument. SABIC claims that: (i) this Court erred by not accepting into the record a submission SABIC characterizes as "an official statement of Saudi Arabian law" from the "Ministry of Justice;" (ii) this Court's decision to uphold the trial court's "arbitrary" use of *ijtihad* (the methodology Saudi judges follow to determine the correct law to apply in each case) constituted a "violation of SABIC's constitutional rights;" (iii) this Court's interpretation of the Delaware Borrowing Statute (10 *Del. C.* § 8121), and its application of that statute to ExxonMobil's counterclaims, deprived SABIC of "due process of law;" (iv) this Court's determination that ExxonMobil's claims were not tolled by the Delaware Tolling Statute (10 *Del. C.* § 8117) was erroneous; and (v) the trial court's jury instruction which this Court upheld, was so

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[2] *McElroy* v. *Shell Petroleum, Inc.*, C.A. No. 375, 1992, 1992 WL 397468 (Del. 1992); *Hessler Inc.* v. *Farrell*, 260 A.2d 701 (Del. 1969); *Seaford Assoc. Ltd P'Ship* v. *Subway Real Estate Corp.*, C. A. No. 2248-S, 2003. WL 21309117 (Del. Ch. May 29, 2003); *In re Marriage of Hackworth*, C.A. No. CK91-4780, 1994 WL 874411 (Del. Fam. Ct. Nov. 1, 1994).

[3] *See Halliburton Co.* v. *Highlands Ins. Group, Inc.*, 811 A.2d 277, 279 (Del. 2002) (denying reargument on claims that amount to a "replowing of old ground").

"devoid of content" as to violate due process. None of these contentions warrants reargument.

4. SABIC's first claim is untimely and in all events lacks merit. This Court's Order denying SABIC's motion to accept its never-before-presented submission was entered on January 29, 2004. Under Supreme Court Rule 8, SABIC had 15 days from the filing of that Order, *i.e.*, until February 13, 2004, to move for reargument. SABIC never filed a timely motion under Rule 8, nor did it raise this claim in its Answering Brief on appeal. Apart from its untimeliness, SABIC's effort to enlarge the record on appeal with new foreign law material, constituted an abuse of any orderly litigation process. As this Court found in its Opinion, the trial court undertook a painstaking inquiry to resolve the disputed issues of Saudi law, based upon 12 expert reports from five different Saudi experts, the depositions of those experts, extensive briefing, and live testimony at a day-long hearing in which each side was afforded the opportunity for cross examination. Unwilling to abide by the procedural rules set down by the trial judge after she made foreign law findings adverse to SABIC's position, SABIC filed additional foreign law affidavits *post-trial*. Although the trial judge was not required to consider such post-verdict submissions, she did so, and concluded that SABIC's submissions did not warrant granting SABIC judgment as a matter of law or a new trial.

5. Undeterred by rules of procedure, rules of evidence, or by principles of fairness and due process, SABIC then filed in this Court, entirely new foreign law material, styled as an "official statement of Saudi Arabian law," authored by undisclosed persons, that had never been previously submitted to the trial court or tested by discovery or cross examination. SABIC made no contention, or showing under Superior Court Rule 60 (b), that the contents of its newest foreign law submission, if important to its position, could not have been obtained and presented during the trial

court proceedings. This Court denied SABIC's motion out of hand, both on that basis[4] and because to rule otherwise would have deprived ExxonMobil of their fundamental procedural right to test SABIC's new submissions by discovery and cross examination.[5] Where it redounds to SABIC's benefit, SABIC finds no inconsistency in violating the very rules of fair procedure and process to which SABIC freely accuses its opponents (and the courts) of failing to adhere.

6. SABIC's remaining four arguments are basically a repetition of the same arguments that it previously presented and that this Court previously rejected. The only difference is that SABIC has repackaged three of those arguments as federal constitutional claims. Although SABIC urges that the trial court's use of the *ijtihad* methodology violated its constitutional rights, SABIC persists in refusing to confront the flaw in its position: SABIC itself chose to litigate in the Delaware forum whose judges (SABIC now insists) are incapable of affording it a fair trial involving issues of Saudi law. Similarly, although SABIC asserts that this Court's interpretation of the Borrowing Statute and the Tolling Statute were so erroneous as to amount to a violation of due process, SABIC makes no effort to support that assertion by showing how this Court's interpretation and application of those state statutes, consistent with case law precedent and the statutory text, could give rise to federal Constitutional violations. Finally, the only constitutional claim that SABIC did present to this Court is its argument

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[4] *See Bata* v. *Bata*, 170 A.2d 711, 714-16 (Del. 1961) (rejecting untimely attempt to add new evidence of foreign law that through "reasonable diligence" could have been submitted to the trial court).

[5] Indeed, an entirely new evidentiary hearing would have been required—a highly inappropriate result given that SABIC made no effort to seek relief from the judgment under Superior Court Rule 60. Moreover, the need for cross-examination was apparent because what SABIC had portrayed as an "official statement" of Saudi law by the "Ministry of Justice" appeared to be an anonymously-authored "study" forwarded under cover of a letter signed by an "Acting Assistant Deputy" whose authority and credentials were not disclosed.

that the trial court's jury instruction on *ghasb* damages was so devoid of content as to violate due process. We rejected that argument for the reasons stated in our Opinion, and SABIC has not shown that in so doing, this Court misapprehended any fact or principle of law.

NOW, THEREFORE, for the above reasons, IT IS ORDERED that SABIC's motion for reargument is DENIED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

APPENDIX G

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	)	
Appellant,	)	No. 493, 2003
v.	)	
MOBIL YANBU PETROCHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	)	Court Below: Superior Court of the State of Delaware in and for New Castle County
	)	C.A. No. 00C-07-161
Appellees.	)	[Stamp: Filed Jan. 24, 2005]

APPELLANT'S MOTION FOR REARGUMENT *EN BANC*

Appellant Saudi Basic Industries Corporation ("SABIC") hereby moves this Court, pursuant to Supreme Court Rule 18, for reargument *en banc* of its appeal of the $416.8 million jury verdict rendered in the Superior Court. In support of this motion, SABIC states as follows:

1. On January 14, 2005, this Court, sitting *en banc*, affirmed the jury verdict in all respects. This case "involves questions of exceptional importance," *Schmeusser v. Schmeusser*, 559 A.2d 1294, 1296 (Del. 1989), that merit reargument *en banc*, even though this case was originally heard *en banc*. See *Pathe Indus., Inc. v. Cadence Indus. Corp.*, 425 A.2d 952, 953 & n.1 (Del. 1981). Critically, this case involves (1) important questions of international comity, as well as questions of equal protection and due process under the United States Constitution; (2) an extreme jury verdict, which is to counsel's knowledge the largest money damages jury verdict in Delaware history; and (3) a foreign sovereign that has been held liable by the Delaware courts.

2. This Court erroneously rejected an official statement of Saudi Arabian law written and proffered by the Ministry of Justice of Saudi Arabia (Ex. 1). Slip op. at 17-18. As SABIC has previously argued, (Ex. 2 at 3-4), "a court of the United States owes substantial deference to the construction" a foreign sovereign "places upon its domestic law." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992). This is so regardless of whether the foreign sovereign is a party to the litigation in which it has expressed its views. *See, e.g., Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) (deferring to Indonesia's official interpretation of law in a case where Indonesia was a party, noting that the United States Supreme Court "'[has] long recognized the demands of comity in suits involving foreign states, either as parties, *or as sovereigns* with a coordinate interest in the litigation.'" quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987)) (emphasis added); *Amoco Cadiz*, 954 F.2d at 1312 (deferring to France's official interpretation of law in a case where France was a party). This Court's determination that the submission was "procedurally improper," slip op. at 18, is erroneous, as evidence of foreign law may be submitted at any stage of any proceeding in a U.S. court, by any vehicle. *See, e.g., Sidali v. INS*, 107 F.3d 191, 197 n.9 (3d Cir. 1997); *Mobile Marine Sales, Ltd. v. M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985); Charles A. Wright & Arthur R. Miller, 9 *Fed. Prac. & Proc. Civ. 2d* § 2444. Moreover, under the "substantial deference" owed to the Saudi Government's statement of law, SABIC should have been granted judgment in this case. *See* Ex. 1 at 2-3 (confirming that *ghasb*/usurpation requires open and obvious, intentional conduct taken without color of right, and cannot exist where a contract covers the conduct), 18-19 (confirming that, under Saudi contract law, where a later, specific contract follows a general one, the specific contract "supersedes the general" contract and "repeals the former in case of a conflict."). Thus, the Court should grant reargument, accept the Saudi Government's statement of law as is

required by applicable principles of international comity, and rule in SABIC's favor. *See generally Hilton v. Guyot*, 159 U.S. 113, 144-68 (1895).

* * *

6. This Court affirmed the Superior Court's jury instructions, including its instruction as to the "enhanced damages" awardable against SABIC under ExxonMobil's *ghasb*/usurpation claim. Slip op. at 63-72. However, as SABIC has previously argued (Op. Br. at 38-39), the instruction–which even this Court acknowledged was "succinct," slip op. at 70—was so devoid of content that the jury was left without sufficient guidance and limitations in rendering an enhanced damages award of $324 million, all in violation of the Due Process Clause of the U.S. Constitution. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell*, 534 U.S. 408, 416-17 (2003); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991). This Court's ruling did not address these due process arguments, and thus reargument should be granted.

WHEREFORE, for the reasons set forth above, SABIC respectfully requests that this Court grant reargument *en banc*.

Respectfully submitted,
MORRIS, NICHOLS, ARSHT & TUNNELL

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January 24, 2005

APPENDIX H

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION
PLAINTIFF BELOW, APPELLANT,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
-and-
EXXON CHEMICAL ARABIA, INC.
DEFENDANTS BELOW, APPELLEES.

No. 493,2003

APPELLANT'S NOTICE OF SUBMISSION AND MOTION FOR ACCEPTANCE OF THE SAUDI ARABIAN GOVERNMENT'S OFFICIAL STATEMENT OF SAUDI LAW INTO THE APPELLATE RECORD

Appellant Saudi Basic Industries Corporation ("SABIC"), the plaintiff/counterclaim defendant below, hereby moves this Court to accept into the appellate record the attached statement of Saudi Arabian law written and proffered by the Ministry of Justice of Saudi Arabia. In support of this motion, SABIC states as follows:

1. SABIC, a company 70% owned by the Saudi government, is appealing to this Court from a $416.8 million jury verdict from the Superior Court of the State of Delaware in and for New Castle County. It is, to counsel's knowledge, the largest money damages jury verdict in Delaware history.

2. The jury verdict rested on a number of critical Saudi-law issues that the Superior Court determined as a matter of Saudi law. A trial court's determination of foreign law is "treated as a ruling on a "question of law," and therefore is subject to *de novo* review on appeal. Super. Ct. Civ. R. 44.1. *See Norris* v. *Norris*, 808 A.2d 758, 760 (Del. 2002).

3. Before trial in this case, the parties each filed expert submissions concerning the substance and interpretation of Saudi law pursuant to Superior Court Civil Rule 44.1. Rule 44.1 provides that a court, "in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence." Under Rule 44.1, experts' foreign-law submissions are acceptable to prove the content of foreign law, in the same way that judicial decisions and statutes are utilized to prove the contents of American law. *See, e.g., id.*; *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999) ("Under [Rule 44.1], expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined."); Charles A. Wright & Arthur R. Miller, *9 Fed. Prac. & Proc. Civ. 2d* § 2444 ("One of the objectives of Rule 44.1 was to abandon the fact characterization of foreign law and to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.").

4. After reviewing the parties' submissions, the trial court hired a neutral Saudi-law expert to aid the court in resolving the differences between the parties' respective experts. *See* Ex. 1 (Jan. 30, 2003 Order). The trial court explained that, because the parties' experts' "opinions offered are so diverse," it wanted "to get an education from somebody who has no dog in the fight so to speak." Ex. 2 (Dec. 19, 2002 (P.M.) Hr'g Tr. at 219:16-222:13). The reports issued by the Court's own neutral expert generally agreed with the views and opinions of SABIC's expert on the critical issues of Saudi law that he examined. To SABIC's surprise, the trial court rejected much of the "education" it had received from its own neutral expert and instead largely adopted ExxonMobil's views of Saudi law in its rulings on the applicable law; the court also adopted a purported Saudi legal rule that was unsupported by any of the expert submissions in the case. *See* Ex. 3 (Mar. 7, 2003 Hr'g Tr. [of Saudi Law Ruling] at 5:3-8:18). Trial, which began the very next busi-

ness day, was conducted according to the trial court's rulings of Saudi law.

5. After the trial, and in light of the trial court's admitted difficulties in ascertaining Saudi law, SABIC requested an official statement from the Saudi Arabian Ministry of Justice on certain issues of Saudi law pertinent to this case. In response, the Saudi Government took over two months to prepare an official statement of law addressing many of these issues. Copies of SABIC's request and the response and official statement, both in Arabic and as translated, are attached as Exhibit 4.

6. SABIC submits that this statement of Saudi law, which represents the official and authoritative views of the Saudi government concerning its own law, will aid this Court in its determination of Saudi law on appeal, particularly in light of the trial court's difficulties in ascertaining Saudi law. *See, e.g.*, 1966 Advisory Comm. Note to Fed. R. Civ. P. 44.1 (noting that Rule 44.1 "provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties").

7. This foreign-law submission is properly presented on appeal to this Court. Delaware Uniform Rule of Evidence 202(e), which is virtually identical to Superior Court Civil Rule 44.1, provides that the Court, "in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules." Del. R. Evid. 202(e). The rule also states that a trial court's determination of foreign law "shall be treated as a ruling on a question of law." *Id.*

8. Cases construing Federal Rule 44.1, which is virtually identical to both Delaware Superior Court Civil Rule 44.1 and Delaware Rule of Evidence 202(e), have uniformly determined that an appellate court is "not confined to information available to or considered by the district court" in making a foreign-law determination. *Sidali* v. *INS*, 107 F.3d 191, 197 n.9 (3d Cir. 1997). *See also Grupo Protexa, S.A.* v. *All Am. Marine Slip*, 20 F.3d 1224, 1239 (3d Cir. 1994) (stat-

ing that an appellate court "exercise[s] plenary review on this question [of foreign law], and [is] not confined to information available to or considered by the district court"). Instead, "[t]he court of appeals on review owes no deference to the district court's determination of foreign law, and may consider information not available to or considered by the district court." *Mobile Marine Sales, Ltd.* v. *M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985).

9. The Saudi Government's official statement of law merits "substantial deference" from this Court and provides a critical tool for this Court to determine the correct rules of Saudi law governing this case. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction" a foreign sovereign "places upon its domestic law."); *see also Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) ("a foreign sovereign's views regarding its own laws merit ... some degree of deference"); *Access Telecom*, 197 at 714 ("Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations."). This is so regardless of whether the foreign sovereign is a party to the litigation in which it has expressed its views. *See Karaha Bodas*, 313 F.3d at 92 (deferring to Indonesia's official interpretation of law in case where Indonesia was a party, noting that the United States Supreme Court "'[has] long recognized the demands of comity in suits involving foreign states, either as parties, *or as sovereigns* with a coordinate interest in the litigation.'" (quoting *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987)) (emphasis added); *Amoco Cadiz*, 954 F.2d at 1312 (deferring to France's official interpretation of law in a case where France was a party).

10. Consideration of the Saudi Government's official statement is especially appropriate in this case where the trial court expressly acknowledged that it found the task of determining Saudi law to be an "extremely difficult ... ex-

tremely challenging and drawn out process" and a "daunting task." *See* Ex. 7 to SABIC's Notice of Appeal, p. 8 and Ex. 8 to SABIC's Notice of Appeal, p. 4, copies of which are attached as Exhibit 5.

WHEREFORE, for the reasons set forth above, SABIC respectfully submits the Saudi Government's official statement of Saudi law to the Court for its consideration, and requests that this Court accept it into the appellate record and enter the attached proposed order.

MORRIS, NICHOLS, ARSHT & TUNNELL

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October 21, 2003

APPENDIX I

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION
PLAINTIFF BELOW, APPELLANT,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
-and-
EXXON CHEMICAL ARABIA, INC.
DEFENDANTS BELOW, APPELLEES.

No. 493,2003

APPELLANT'S REPLY IN SUPPORT OF NOTICE OF SUBMISSION AND MOTION FOR ACCEPTANCE OF THE SAUDI ARABIAN GOVERNMENT'S OFFICIAL STATEMENT OF SAUDI LAW INTO THE APPELLATE RECORD

In its response, ExxonMobil does not and cannot refute the fundamental points that support acceptance of the Saudi Government's official statement of Saudi law:

- The Saudi Government's official statement of law is submitted to assist this Court in fulfilling its responsibility to determine foreign law, particularly in view of the trial court's acknowledgment that it found the job an "extremely difficult . . . extremely challenging and drawn out process" and a "daunting task," *see* Ex. 5 to SABIC's motion.
- In determining a question of foreign law, this Court "may consider *any* relevant material or source ... whether or not submitted by a party or admissible under the Delaware Rules of Evidence," Superior Court Civil Rule 44.1, and this Court, which will address the question *de novo*, "owes no deference to the [trial] court's determination of foreign law, and

may consider information *not available to or considered by the [trial] court." Mobile Marine Sales, Ltd.* v. *M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985).

- Rule 44.1 and its federal counterpart provide "flexible procedures" for introducing foreign-law materials so that a "sound result" can be achieved, *see, e.g.*, 1966 Advisory Comm. Note to Fed. R. Civ. P. 44.1.
- SABIC sought the official Saudi Government statement only after the trial court surprisingly rejected the submissions of the trial court's *own neutral* Saudi-law expert on the eve of trial.

Indeed, ExxonMobil recognizes (Resp. 4) that this Court has "discretion" to accept the Saudi Government statement. Nevertheless, in lieu of addressing the merits of SABIC's motion, ExxonMobil goes to excessive lengths to impugn SABIC, the Saudi Government's statement, and even the Saudi Government itself. These tactics are misplaced. The goal here is to ascertain the parameters and content of Saudi law, and the Saudi Government's official statement is a wholly appropriate tool that this Court can and should use to assist it in carrying out that task. In all events, ExxonMobil's objections go to the weight of the statement, not its acceptance, and should be evaluated by the merits panel along with the full record in this case.

I. THE STATEMENT OF SAUDI LAW IS AN OFFICIAL SUBMISSION OF THE SAUDI ARABIAN GOVERNMENT

ExxonMobil's primary argument (Resp. 1-3) is that the Saudi Government's statement is not an *official* statement of the Saudi Government. This argument is wrong and desperate.

First, the statement is, on its face, an official government document. It was submitted under a cover letter written on the letterhead of the "Kingdom of Saudi Arabia Ministry of Justice" and signed by the "Acting Assistant Deputy

Minister of Justice for Judicial Affairs." It responds directly to a request made of the "Minister of Justice." Moreover, it would be a crime to fabricate such an official government document, and the authenticity of the statement can be confirmed by anyone by telephoning the Ministry of Justice and providing the statement's reference number—6/48384/24.

Second, ExxonMobil's subsidiary argument, that the Ministry of Justice is not empowered to issue this official statement, fares no better. As the U.S. government recognizes, the Minister of Justice is the "de facto chief justice" of Saudi Arabia and is the "chief of the Supreme Judicial Counsel." *See* U.S. Country Study of Saudi Arabia, *www.countrystudies.us/saudi-arabia/5l.htm* (attached as Ex. 1). In addition, the Saudi Law of the Judiciary authorizes the Ministry to collect "the principles" established by Saudi appellate judgments, to answer inquiries of judges and to "review judgments and give opinions on the legal principles on which . . . [they were] based." *The Law of the Judiciary*, Royal Decree No. M/64, art. 89(a)-(e) (1975) (attached as Ex. 2).[1] No more appropriate author is imaginable. In accord with Saudi law, the Ministry is authorized to, and frequently does, officially answer legal questions posed by government or private parties, and even will do so through its website, *www.moj.aov.sa.*

Third, ExxonMobil's suggestion that the statement is merely an unauthoritative "study," ignores the fact that the statement responded to an official inquiry from SABIC, and fails to account for the Ministry's statement that the study is an official "reply to [SABIC's] inquiries."

Finally, ExxonMobil's unsupported allegations that the Saudi Government statement "reeks of bias" and is "law on

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[1] Professor Vogel elaborates upon these duties in his book, *Islamic Law and Legal System: Studies of Saudi Arabia* (2000). ExxonMobil's out-of context citation to this book referred to an instance, irrelevant here, in which Professor Vogel was unable to secure certain unpublished appellate decisions after providing a letter of introduction written by the Minister of Justice.

demand" (Resp. 3-4) are offensive. Saudi Arabia is a sovereign nation, acting through its government, and its expressions of its own legal principles are entitled to respect and comity. *See, e.g.*, *Hilton* v. *Guyot*, 159 U.S. 113, 144-68 (1895); *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002). And a reading of the Saudi Government's exhaustive 21-page statement belies ExxonMobil's assertion (Resp. 3) that the statement is "astonishingly specific" and thus biased.

II. THE SAUDI GOVERNMENT STATEMENT IS TIMELY AND WITHIN THE SCOPE OF RULE 44.1

ExxonMobil is similarly mistaken that the Saudi Government statement is outside the scope of Rule 44.1. *First*, ExxonMobil does not and cannot refute that each of the cases cited by SABIC, which considered official foreign-government legal statements offered on appeal by foreign-government parties, accepted those statements *and* deferred to them. *See Karaha Bodas*, 313 F.3d at 92; *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

Second, ExxonMobil mischaracterizes the cases it says support its claim of untimeliness under Rule 44.1. ExxonMobil primarily relies upon *Bata* v. *Bata*, 170 A.2d 711, 714-16 (Del. 1961) and *Moumdjis* v. *Ionian Trader*, 157 F. Supp. 319, 320 (E.D. Va. 1957). Both cases *predate* Rule 44.1, which clarified that foreign-law determinations are questions of *law, not fact*. Both cases are also wholly inapposite:

- In *Bata*, the Court denied a petition to reargue an *already-decided* appeal on the basis that purportedly newly obtained expert evidence showed that the position the petitioner had itself urged both at trial and on appeal was incorrect. The Court denied the petition since the purportedly newly obtained evidence had in fact been discovered and advanced by petitioner's counsel in other proceedings years *before* the Delaware case had commenced, and had

been "deliberately abandoned" in the Delaware case. *See* 170 A.2d at 714-16.

- In *Moumdjis*, the court held merely that a party was not required to respond to a request to admit the correctness of a foreign-law opinion letter written by a law firm. The court did note that a party may introduce without a witness "evidence of any recognized publication or textbook attempting to interpret the foreign law." 157 F. Supp. at 320.

In fact, no case ExxonMobil cites (or of which SABIC is aware) has rejected a foreign-law expert report on the ground that it was merely untimely. *See, e.g., Mobil Marine*, 776 F.2d at 90-92 (analyzing "evidence of Panamanian law presented to *this Court*" including "Panamanian statutes provided by the parties" and "the opinion of a Panamanian lawyer," and relying upon such submissions to affirm "although our reasoning differs from the district court's").

Third, the only "unfair surprise" that Rule 44.1 concerns itself with is that caused by a belated assertion that foreign law applies in a particular case, not by evidence as to the precise content of the applicable foreign law. *See* Fed. R. Civ. P. 44.1 adv. comm. note. ExxonMobil's citation of *Banque Libanaise Pour Le Commerce* v. *Khreich*, 915 F.2d 1000, 1006-07 (5th Cir, 1990), is inapposite. That case held that the appellant—which had failed to introduce *any* coherent foreign-law evidence in the trial court—had failed to sustain its burden of showing that Abu Dhabi law was different from Texas law: All agree here that the applicable Saudi law is different from Delaware law, and here, unlike in *Banque Libanaise*, SABIC made extensive submissions below as to the correct Saudi law. The Saudi Government's statement simply confirms SABIC's submission as well as the views of the trial court's own neutral expert, which the trial court ultimately rejected. Accordingly, there is no "unfair surprise" here.

Fourth, ExxonMobil's citation of the trial court's Saudi-Law Hearing transcript (Resp. 2) is out of context. The cited statement pertained to ExxonMobil's attempt, contrary to

the court's prior rulings, to have its expert testify as to materials not cited in his expert reports. SABIC's objection and the trial court's ruling were based solely on the ground rules established for that hearing, not upon any interpretation of Rule 44.1. *See* 3/5/03 P.M. Tr. at 181-188; 3/7/03 A.M. Tr. at 84-89 (collectively attached as Ex. 3).

Finally, ExxonMobil's characterization of the Saudi Government statement as "factual" is incorrect. The purpose of Rule 44.1 and its federal analogue was "to abandon the fact characterization of foreign law and to make the process of determining alien law identical with the method of ascertaining domestic law." Wright & Miller, *9 Fed. Prac. & Proc. Civ. 2d* § 2444. Accordingly, appellate courts do not defer to a trial court's assessment of the "credibility or demeanor of foreign-law experts. *See, e.g., Grupo Protexa, S.A.* v. *All Am. Marine Slip*, 20 F.3d 1224, 1239 & n. 23 (3d Cir. 1994).

CONCLUSION

The Saudi Government's official statement of Saudi law should be accepted.

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November 7, 2003

APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	)	
Appellant,	)	No. 493,2003
v.	)	
MOBIL YANBU PETROCHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	)	
Appellees.	)	

APPELLANT'S MOTION FOR REMAND FOR RECONSIDERATION OF CERTAIN OF SABIC'S POST-TRIAL MOTIONS FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR A NEW TRIAL, IN LIGHT OF THE SAUDI GOVERNMENT'S OFFICIAL STATEMENT OF SAUDI LAW

Appellant Saudi Basic Industries Corporation ("SABIC"), the plaintiff/counterclaim defendant below, hereby moves this Court, pursuant to Supreme Court Rule 19(c), for a remand to the Delaware Superior Court. In support of this motion, SABIC states as follows:

1. As discussed in SABIC's prior Motion for Acceptance of the Saudi Government Statement, *see* Ex. 1, SABIC is appealing to this Court from a $416.8 million jury verdict rendered in the Superior Court of the State of Delaware in and for New Castle County. It is, to counsel's knowledge, the largest money damages jury verdict in Delaware history. The verdict rested on a number of critical Saudi-law

issues that the Superior Court determined as a matter of law. A trial court's determination of foreign law is "treated as a ruling on a question of law," Super. Ct. Civ. R. 44.1, and therefore is subject to *de novo* review on appeal. *See Norris v. Norris*, 808 A.2d 758, 760 (Del. 2002).

2. Before trial, the parties each filed expert submissions concerning the substance and interpretation of Saudi law pursuant to Superior Court Civil Rule 44.1. Rule 44.1 provides that a court, "in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence." Under Rule 44.1, experts' foreign-law submissions are acceptable to prove the content of foreign law, in the same way that judicial decisions and statutes are utilized to prove the content of American law. *See, e.g., id.*; Ex. 1 at 2 (citing authorities).

3. After reviewing submissions of the experts retained by the parties, the trial court hired a neutral Saudi-law expert to aid the court in resolving the differences between the parties' respective experts. *See* Ex. 2 (Jan. 30, 2003 Order). The trial court explained that, because the parties' experts' "opinions offered are so diverse," it wanted "to get an education from somebody who has no dog in the fight so to speak." Ex. 3 (Dec. 19, 2002 (P.M.) Hr'g Tr. at 219:16-222:13). The reports issued by the Court's own neutral expert generally agreed with the views and opinions of SABIC's expert on the critical issues of Saudi law that he examined. For example, the neutral expert, Wolfson, agreed with SABIC's expert both that the Saudi tort of *ghasb* requires open and obvious, rather than secret or covert, conduct and that, in all events, it is unprecedented for a Saudi court to award "enhanced" damages in a contract case such as this one and unlikely that a Saudi judge would do so here. *See, e.g.*, Ex. 4 (Wolfson's Report) at 14-20; Ex. 5 (Wolfson's Supplementary Report) at 2-4, 8-10; Ex. 6 (Wolfson Dep.) at 132-33. Because ExxonMobil alleged and tried its case based on the fundamental premise that SABIC's conduct was at all times secret and covert, adoption of the neutral expert's

conclusions as to either *ghasb* or enhanced damages would have compelled judgment for SABIC on ExxonMobil's *ghasb* and enhanced damages claims—upon which the jury awarded ExxonMobil $324 million.

4. To SABIC's surprise, the trial court rejected the *ghasb* and enhanced damages conclusions of its own neutral expert and instead largely adopted ExxonMobil's views of Saudi law in its rulings on the applicable law; the trial court also adopted a purported Saudi legal rule—that ExxonMobil could prove its *ghasb* claim by showing a wrongful taking of property by SABIC without consent and "in blatant or reckless disregard" of Exxon or Mobil's property rights–which was unsupported by *any* of the expert submissions in the case. *See* Ex. 7 (Mar. 7, 2003 Hr'g Tr. of Saudi Law Ruling at 5:3-8:18). Trial, which began the very next business day, was conducted according to the trial court's rulings of Saudi law. Moreover, after refusing SABIC's request to have the court's neutral expert address the critical Saudi-law rule of contract interpretation that a later, specific contract always trumps and supercedes an earlier, general contract that touches upon the same subject matter, *see* Exs. 8, 9, the trial court also ruled against SABIC on that point during trial, *See* Ex. 10 (Mar. 19, 2003 Hr'g Tr.) at 20-23, 42-43; Ex. 11 (Mar. 20, 2003 P.M. Trial Tr.) at 4-5; Ex. 12 at Proposed Instr. 4.2; Ex. 13 at Inst. 4.2.

5. After the trial, and in light of both the trial court's rejection of its neutral expert's views on critical points and its admitted difficulties in ascertaining Saudi law, SABIC requested an official statement from the Saudi Arabian Ministry of Justice on certain issues of Saudi law pertinent to this case. In response, the Saudi Government prepared a 21-page-long official statement of law addressing many of these issues. *See* Ex. 14. Such foreign governments' official positions on their own law are regularly submitted to and merit "substantial deference" from courts of the United States. *See, e.g., Karaha Bodas Co., L.L.G. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002) (deferring to Indonesia's official interpretation of

law in case where Indonesia was a party); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (deferring to France's official interpretation of law in a case where France was a party); *see also* Ex. 1 at 3-4.

6. SABIC believes that the statement of Saudi law, which represents the official and authoritative views of the Saudi Government concerning its own law, would provide a critical tool for this Court to determine the correct rules of Saudi law governing this case, particularly in view of the trial court's express, and understandable, acknowledgement that it found the job of determining Saudi law to be an "extremely difficult . . . extremely challenging and drawn out process" and a "daunting task." *See* Exs. 9, 10. Accordingly, because "[t]he court of appeals on review owes no deference to the district court's determination of foreign law, and may consider information not available to or considered by the district court," *Mobile Marine Sales, Ltd. v. M/V Prodromos*, 776 F.2d 85, 89 (3d Cir. 1985), *see also* Ex. 1 at 3 (citing other authorities), SABIC moved on October 21, 2003, for this Court to accept the Saudi Government's statement into the appellate record.

7. During a telephone conference on November 13, 2003, regarding SABIC's Motion for Acceptance, Justice Holland noted both this Court's institutional preference to have potentially dispositive materials first considered by the trial court and Rule 44.1's paramount objective to "get the [foreign] law right." Justice Holland then suggested that SABIC might wish to seek remand for the trial court to consider the Saudi Government's statement.

8. In light of the Court's suggestion, the importance of this case, and the possible benefit to this Court of the trial court's views on the Saudi Government's statement, SABIC now moves for a remand pursuant to Supreme Court Rule 19(c). Such a remand is within this Court's discretion. Moreover, it would comport with the United States Supreme Court's long-established "GVR" practice of remanding lower court decisions "[w]here intervening developments, or recent developments that we have reason to believe the court

below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lords Landing Village Condominium Coun. v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (citations omitted); *see also* Theodore B. Olson & John K. Bush, *Two Recent High Court Cases List GVR Criteria*, 18 Nat'l Law J. 48, at B10, col. 1 (July 29, 1996) (noting that such a remand may be appropriate in light of new "administrative interpretations of federal statutes," or "positions newly taken by the Solicitor General and state attorneys general").

9. Here, the extraordinary circumstances of the trial court's difficulties in ascertaining Saudi law and rejection of its own neutral expert's conclusions on many of the critical Saudi-law issues in this case, the availability of the Saudi Government's statement, and the importance of this case, all strongly support the remand that SABIC requests.

WHEREFORE, for the reasons set forth above, SABIC respectfully requests that this Court enter the attached Order remanding this case to the Delaware Superior Court for the purpose of supplemental briefing, argument (in the discretion of the court) and reconsideration of judgment for and upon SABIC's Post-Trial Motions for Judgment as a Matter of Law, or in the alternative for a new trial, on ExxonMobil's Contract, *Ghasb*, and Enhanced Damages claims, in light of the Saudi Arabian Government's Official Statement of Saudi law.

Respectfully submitted,

MORRIS, NICHOLS, ARSHT & TUNNELL

/s/
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November 17, 2003

APPENDIX K

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAUDI BASIC INDUSTRIES CORPORATION,	)	
Appellant,	)	
v.	)	No. 493,2003
MOBIL YANBU PETROCHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	)	
Appellees.	)	

APPELLANT'S REPLY IN SUPPORT OF REMAND FOR RECONSIDERATION OF CERTAIN OF SABIC'S POST-TRIAL MOTIONS FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR A NEW TRIAL, IN LIGHT OF THE SAUDI GOVERNMENT'S OFFICIAL STATEMENT OF SAUDI LAW

In its response, ExxonMobil does not and cannot refute the fundamental points and considerations that both support remand and negate ExxonMobil's arguments:

- As Justice Holland noted during the November 13, 2003 telephone conference with the parties, the paramount objective of Superior Court Civil Rule 44.1 is to "get the [foreign] law right."
- Under Rule 44.1, a trial court's determination of foreign law is "treated as a ruling on a question of law," and therefore is subject to *de novo* review on appeal.
- Rule 44.1 provides that a court, "in determining foreign law, may consider *any relevant material or*

source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence." (emphasis added)

- The Saudi Government's expression of its own legal principles is not a submission of a party-appointed expert; it is the official statement of a sovereign nation, and is entitled to respect, comity, and "substantial deference" from courts of the United States. *See, e.g.*, *Hilton* v. *Guyot*, 159 U.S. 113, 144-68 (1895); *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Build Negara*, 313 F.3d 70, 92 (2d Cir. 2002); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

Indeed, ExxonMobil does not dispute (Resp. 1-4) either that this Court has discretion to order a remand or that the trial court acknowledged that the job of determining Saudi law was "extremely difficult" and a "daunting task." *See* Ex. 1,¶13 & Ex. 2, ¶6. Instead, ExxonMobil impugns SABIC and its purported motives in submitting the Saudi Government's official statement of Saudi law and argues, in the alternative, for an unlimited remand. Neither tactic is persuasive. *The key objective here is to correctly determine Saudi law.* A limited remand to ascertain the trial court's views in light of the Saudi Government's statement should aid this Court in reaching that objective.

[2]I. REMAND IS APPROPRIATE

ExxonMobil's primary argument (Resp. 1-3) is that the "equities" counsel against remand here. This argument ignores the dispositive considerations here and is wrong in all events.

While never addressing *this Court's* discretion to order a remand, ExxonMobil bases its opposition on a mischaracterization of the U.S. Supreme Court's "GVR" procedures that SABIC noted prescribe remand in circumstances similar to those here. Contrary to ExxonMobil's assertions, the leading treatise on U.S. Supreme Court practice notes that GVR "remands are not infrequent in current practice," and that the governing standard is "lenient." Stern & Gressman,

Supreme Court Practice 233 n.27, 319 (8th ed. 2002).[1] Thus, the Court routinely uses its GVR powers to remand for "further consideration" in light of legal positions "asserted by the Solicitor General" in the Supreme Court. *See, e.g., Goffer v. West*, 519 U.S. 1052 (1997); Stern & Gressman at 317 (citing cases). Comity dictates the same result here in view of the Saudi Government's statement of law. *See, e.g., Guyot*, 159 U.S. at 144-68; *Amoco Cadiz*, 954 F.2d at 1312. Moreover, the "equities" discussed in *Lawrence v. Chater* as passible reasons to deny remand—a "confession of error in some, but not all, aspects of the decision below" and unjustified "delay and further cost"—are plainly not at issue here. 516 U.S. 163, 167-68 (1996). In all events, the equities strongly support remand here.

First, SABIC did not improperly or unreasonably delay its request for the official statement of law. ExxonMobil and its expert did not fully clarify their position on the applicable Saudi law until the last court day before trial. *See, e.g.*, Ex. 3 (Hallaq 9/12/02 Expert Rep.) at 7 (failing to provide elements of *ghasb*); Ex. 4 (Hallaq 12/6/02 Dep.) at 101-103 & 109-116 (resisting any definition of the elements of *ghasb* because, in his view, "the definition [of *ghasb*] could be many things"); Ex. 5 (3/7/03 Saudi Law Hr'g Tr.) at 80-81 (Hallaq testifying as to certain elements of *ghasb* and stating that he "strongly disagree[s]" with the court's neutral expert as to those elements). The trial court hired a neutral expert who generally agreed with SABIC and its expert on the critical issues of Saudi law that he examined. *See, e.g.*, Exs. 4, 5, 6 to SABIC's Motion. However, to SABIC's surprise, the trial court rejected its neutral expert's views and adopted ExxonMobil's positions of Saudi law just before trial began. After trial, SABIC was jurisdictionally required to file its

[1] Even Justice Scalia, the Justice most in favor of a *narrow* "GVR" practice, has stated that remand is appropriate "where an intervening factor has arisen that has a legal bearing upon the decision, "*Lawrence v. Chater*, 516 U.S. 163, 191-192 (1996) (Scalia, J, dissenting)—the precise circumstance present here.

motions for JMOL and for a new trial within 10 days. *See* Super. Ct. Civ. R. 59(b), (d).

Second, contrary to ExxonMobil's rhetoric, the trial court frankly and repeatedly acknowledged its difficulties in determining Saudi law. *See* Exs. 1 & 2. Indeed, the trial court noted that its process for determining Saudi law might have been different "[i]n an ideal world with six more months of time for studying and reflection." Ex. 9 to SABIC's Motion at 26. Accordingly, it makes perfect sense to give the trial court the benefit of the Saudi Government's statement to aid in reaching Rule 44.1's paramount objective of getting the Saudi law right.

Third, ExxonMobil's citation of the trial court's Saudi-Law Hearing transcript (Resp. 3) is out of context. The cited statement pertained to ExxonMobil's attempt, contrary to the court's prior rulings that were urged by *ExxonMobil's counsel*, to have its expert testify as to materials not cited in his expert reports. *See* Ex. 6 (3/5/03 P.M. Tr.) at 181-188. SABIC's objection and the trial court's ruling were based solely on the ground rules established *for that hearing*—rules that ExxonMobil itself requested. *See* Ex. 7 (3/7/03 A.M. Tr.) at 84-89.

Finally, ExxonMobil's half-hearted attempt (Resp. 3 & n.2) to claim that the court's neutral expert, Wolfson, actually supported the trial court's determinations of Saudi law is unavailing. ExxonMobil's citations themselves demonstrate the opposite. Wolfson explained that the three "influential scholars" he discussed in his deposition *did* agree that there is an openness requirement for *ghasb*, but that they used the Arabic word "qahran," rather than the Arabic word "jahran" to convey that requirement. Ex. 6 to SABIC's Motion at 47-48. Wolfson indeed stated that "a secretive taking would be actionable," but ExxonMobil omits the portion of Wolfson's testimony that says such a taking would be actionable under Saudi-law doctrines *apart from ghasb*, and for which "enhanced damages" are *not* permitted. *Id* at 39-42, 103-04. Wolfson's reports strongly emphasize the openness requirement and the unavailability of enhanced dam-

ages in a case such as this one. *See* Exs. 4-6 to SABIC's Motion.

MORRIS, NICHOLS, ARSHT & TUNNELL

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December 1, 2003

APPENDIX L

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION;	)	
Plaintiff,	)	Civil Action No. 00C-07-161
v.	)	
MOBIL YANBU PETRO-CHEMICAL COMPANY, INC., *et al.*,	)	
Defendants.	)	

EXPERT REPORT OF WAEL B. HALLAQ

Personal Background and Experience

1. I am, and have been since 1994, a Full Professor of Islamic Studies at the Institute of Islamic Studies, McGill University, Montreal, Canada ("Institute"). My current *Curriculum Vitae* is attached to this Report as Exhibit A. As noted therein, I was an Assistant Professor at the Institute between 1985-89 and a tenured Associate Professor between 1989 and 1994, when I earned my Full Professorship. I received my Masters of Arts and PhD. in Islamic law at the University of Washington, Seattle, Washington, in 1979 and 1983, respectively.

2. I have authored numerous books and articles on various topics in Islamic law, most of which are listed in my *Curriculum Vitae*. Among my publications are: *Authority, Continuity and Change in Islamic Law* (2001) and *A History of Islamic Legal Theories: An Introduction to Usul al-Fiqh* (1997), both of which were published by Cambridge University Press. I have also written other books and nu-

merous scholarly articles and book reviews, all published by peer-reviewed scholarly journals and academic publishers of first order, including Oxford University Press, Variorum and Harvard University Press. I am currently working, among other things, on editing an eight-volume series on Islamic law for Cambridge University Press, the first volume of which I am in the process of writing. My *Curriculum Vitae* also shows the extent of my scholarly engagement in delivering academic lectures and presenting researched papers at leading universities and learned associations throughout the world.

3. I have been consulted as an expert witness on Islamic law in a variety of controversies and cases in both the United States and Canada. In the last four years, I have given oral testimony on only one occasion, in the case of *Crown vs. Humaid* in the Superior Court of Ontario, Ottawa, Canada, on December 10, 2001.

Purpose and Scope of Report and Opinions

4. I am providing this Report at the request of counsel for Mobil Yanbu Petrochemical Company ("Mobil Yanbu") and Exxon Chemical Arabia, Inc. ("ECAI") (hereafter collectively "ExxonMobil") in the above-captioned litigation with Saudi Basic Industries Corporation ("SABIC"). I am being compensated for my services at the hourly rate of $300.00, plus a one-time retainer in the amount of $15,000.

5. I have been asked to opine on the following issues of Islamic law as the courts of Saudi Arabia would by law be required to apply them: (a) the characterization of ExxonMobil's pleaded claims under Islamic law; (b) the construction of Article 6.3 of the Joint Venture Agreement between SABIC and ECAI and Article 6.3 of the Joint Venture Agreement between SABIC and Mobil Yanbu ("Joint Venture Agreements"); (c) the method for computing damages arising from usurpation when the usurped property is money; and (d) whether any aspect of the 1987 letter-agreement between Al-Jubail Petrochemical Company ("KEMYA") and SABIC or the 1987 letter-agreement be-

tween Saudi-Yanbu Petrochemical Company ("YANPET") and SABIC ("1987 Letter-Agreements") in any way prevents ExxonMobil from pursuing its claims in this lawsuit. For this purpose, I was provided with: (A) copies of the pleadings in this matter; (B) copies of the two Joint Venture Agreements identified above, including an Arabic version of the SABIC/ECAI Joint Venture Agreement; (C) a copy of the "UNIPOL Agreements." (meaning: (*i*) the agreement between Union Carbide Corporation ("Union Carbide") and SABIC, dated September 28, 1980, relating to Union Carbide's "UNIPOL" technology ("Union Carbide/SABIC UNIPOL Agreement"); (*ii*) the UCC PE Technology License Agreement Between Saudi Basic Industries Corporation and Al-Jubail Petrochemical Company, dated November 18, 1980; and (*iii*) the SABIC-YANPET UCC PE Technology License Agreement, dated November 10, 1980); (D) copies of the 1987 Letter-Agreements; (E) a copy of the June 25, 1987 Letter-Agreement between Union Carbide and SABIC ("Union Carbide/SABIC Letter-Agreement") and (F) a copy of Charts A, B, C, and D of SABIC's Supplemental (May 15, 2002) Responses to Defendants' First Set of Interrogatories. In addition, I have consulted numerous authoritative works of Islamic law (those cited herein listed at the conclusion of this Report).

Choice-of-Law Provision in Joint Venture Agreements

6. The Joint Venture Agreements both contain provisions calling for the application of Saudi Arabian law (Article 18.1 of the SABIC/ECAI Joint Venture Agreement and Article 16.1 of the SABIC/Mobil Yanbu Joint Venture Agreement). These choice-of-law provisions cover the entirety of the parties' rights and obligations under the Joint Venture Agreements, including Articles 6.3 contained therein.

Background on Islamic Law

7. Islamic law, or *Shari'a*, is a fundamentally religious law based on both the *Quran* and the model behavior of the Prophet Muhammad (known as "*Sunna*"). The *Quran*, or holy Muslim Scriptures, includes about five hundred legal

verses that constitute key subject matter for the jurists' interpretation of the law. The model behavior of the Prophet is found in *Hadith* or literary narratives, collected by scholars who flourished during the ninth century A.D. Jurists have studied the *Quran* and *Hadith* and have in turn expounded on the fundamental principles of Islamic law that govern Islamic nations.

8. Over time, the Muslim jurists developed four legal schools of thought, one of which came to be known as the *Hanbali* School, named after the ninth century distinguished scholar Ahmad Ibn Hanbal. The founders of the modern-day Saudi Kingdom adopted the theological and legal principles of the *Hanbali* School as the working doctrine and law of the country. Under Article 48 of the Saudi Constitution, *Shari'a* law reigns supreme as the fundamental law of the Kingdom, which in Saudi Arabia means the *Hanbali* precepts. Even the King himself is subject to these precepts.

9. There are five fundamental principles that underlie the entirety of Islamic law, namely, rights to religion, life, property, procreation and mind. Thus, property rights are a basic and cherished tenet that enjoy an elevated protection under Islamic law, akin to life itself (Hallaq, *History*, pp. 89, 168).

ExxonMobil's Claims Under Islamic Law

10. Based upon my review of the pleadings, and assuming the facts alleged by ExxonMobil to be true, it is my considered opinion that two principles of Islamic law entitle ExxonMobil to assert that SABIC has unlawfully taken property (in the form of money) belonging to the joint ventures, KEMYA and YANPET. These two principles are: (a) that parties to a contract may not take property that the contract prohibits them from taking; and (b) partners owe each other duties of trust (*amana*) as well as the obligation not to betray that trust, an act amounting to treachery (*khiyana*). As explained below, ExxonMobil's pleadings allege facts that would establish a violation of both of these principles and that would therefore give rise to a claim for usurpa-

tion, or *ghasb*, entitling ExxonMobil to a recovery of the property in question, plus damages.

* * *

14. Islamic law also requires partners to deal with each other honestly and to act in accordance with the relationship of trust (*amana*) that is assumed to exist between them and that is one of the hallmarks of a partnership (Buhuti, *Kashshaf*, vol. 3, pp. 535, 540; *idem.*, *Sharh*, vol. 2, p. 321). The principle of *amana* forbids partners from making a profit at the expense of one another, especially in the absence of a full disclosure of the facts giving rise to the profiteering. A breach of this *amana* is an act of treachery (*khiyāna*). When such illicit profiteering occurs, as I understand to be alleged by ExxonMobil in this case, the conduct of the partner that so profited amounts to *khiyana* (Buhuti, *Kashshaf*, vol. 3, p. 538; *idem.*, *Sharh*, vol. 3, p. 502).

15. In this case, assuming the facts as pleaded by ExxonMobil to be true, SABIC's conduct in charging KEMYA and YANPET a higher price for UNIPOL technology rights than SABIC paid to Union Carbide would constitute an unlawful taking of property (money) under both Articles 6.3 of the Joint Venture Agreements and according to the principles of *amana* and *khiyana* in *Shari'a* law. Such an unlawful taking of property is considered usurpation, or *ghasb*. *Ghasb* is the law governing the unlawful taking of property (including money) in violation of one of the five fundamental principles of Islamic law, and the entitlement to restitution and damages arising therefrom. The *Quran* itself (Chapter 2, Verse 188) states that "individuals should not take the property of each other unlawfully." The Islamic jurists, based upon the *Quran* and the *Sunna*, teach that a legitimate ownership interest in property (again, including money) is sacrosanct and subject to the highest protection of the law. The Prophet stated: "No property in the hands of a Muslim is lawful unless it is possessed with his good conscience" (cited in Buhuti, *Kashshaf*, vol. 4, p. 75). Conversely, usurpation is viewed as a grave violation of both strict law and legal morality. Here, too, the Prophet said:

"He who usurps a foot of land will be punished in the Hereafter with seven lands collapsing upon him (cited in Buhuti, *Sharh*, vol. 2, p. 400). The above pronouncements—together with the Prophetic statement that the usurper "will continue to be under obligation until the usurped matter is restored" (cited in ibid, vol. 2, p. 401)—constitute the basis of the law of usurpation.

Damages Available for Usurpation

16. As noted above, restoration of the usurped property is a fundamental right that belongs to the rightful owner, and this right is no less fundamental when the property in question is money. In addition to the recovery of the usurped property, the victim of *ghasb* is also entitled to recover from the usurper any increase in the value of the property that accrued to the usurper during the entire period in which the usurper unlawfully held the property. Where the usurped property is money, in addition to the return of the money, the victim of usurpation is entitled to recover from the usurper all additional money the usurper has earned or gained through the use of the unlawfully usurped funds. For example, if the usurper unlawfully takes $100 from the victim and invests that money in a business which makes $50 of profit (*i.e.*, turns the $100 to $150) during the period of usurpation, the victim is entitled not only to the restoration of the $100 originally usurped, but also to additional $50 (*see* Buhuti, *Sharh*, vol. 2, pp. 326, 406, 422; *idem*, *Kashshaf*, vol. 4, pp. 86, 188; Ibn Qudama, *Mughni*, vol. 5, pp. 397, 398; *idem*, *Kafi*, vol. 2, pp. 280, 281; Maqdisi, *Udda*, pp. 268-72; *Majallat al-Ahkam al-Shar'iyya*, articles 1394, 1395, 1396; *al-Mawsu'a al-Fiqhiyya*, vol. 28, pp. 232).

17. Islamic law also recognizes that in cases of usurpation, the usurped property can come to be commingled (*khalt*) with the usurper's own property. Where the property in question is money, and where it is impossible to isolate the usurped money because of such commingling, the appropriate compensation to the victim is measured by the increase in the usurper's wealth. The victim, in addition to the amount originally usurped, is entitled to a proportion of

that increase in wealth relative to its involuntary contribution to that wealth at the time of the usurpation. For example, if the usurper unlawfully takes $100 and combines it with a $100 of its own, any profits earned through use of the commingled funds would inure 50% to the victim in addition to the return of the originally usurped $100 (*see* Ibn Qudama, *Mughni*, vol. 5, p 406, *idem.*, *Kafi*, vol. 2, pp. 280-281; Buhuti, *Sharh*, vol. 2, pp. 410; *idem.*, *Kashshaf*, vol. 4, pp. 92-93; Ibn Taymiyya, *al-Fatawa al-Kubra*, vol. 5, p. 418; Ibn Muflih, *Furu'*, vol. 4, pp. 505-06, Mardawi, *Insaf*, vol. 6, p. 162).

* * *

/s/ Wael Hallaq
Wael B. Hallaq

September 12, 2002
Date

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APPENDIX M

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	Judge Jurden
v.	)	Civil Action No. 00C-07-161 JRJ
MOBIL YANBU PETRO-CHEMICAL COMPANY, INC., -and- EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	
CITY of CAMBRIDGE	)	
STATE of MASSACHUSETTS	):ss.:	

FRANK E. VOGEL, being duly sworn, does hereby depose and state as follows:

Qualifications

1. I am Custodian of the Two Holy Mosques Adjunct Professor of Law at Harvard Law School. I have been teaching at Harvard Law School since 1987 and since 1991 have been Director of the School's Islamic Legal Studies Program which I founded. I attach my curriculum vita as Appendix 1.

2. My fields of teaching and research are Islamic law and legal systems, modern and medieval; law of modern Muslim countries; modern developments and controversies in Islamic law, particularly the application of Islamic law;

law of Saudi Arabia; Islamic contract and commercial law, particularly in its contemporary development; Islamic constitutional law and history; American contract law; laws of the Arab world; and Islam and human rights.

3. My knowledge of the laws of Saudi Arabia is based on my knowledge of Islamic law but also on continuous study of and involvement with the Kingdom's legal system since 1978. From February 1983 to December 1985, I was engaged in full-time research on the legal system while living in Riyadh, attending months of sessions of various courts and interviewing judges, scholars, and government officials. From January 1986 through July 1987, I continued this research while also conducting the practice of law in Riyadh as an associate of the firm Jones, Day, Reavis & Pogue, in association with Ahmed Zaki Yamani Law Offices. Since returning to Harvard Law School in 1987, I have completed a dissertation resulting in a book on Saudi law and the Saudi legal system (*Islamic Law and Legal System: Studies of Saudi Arabia* (Boston: Brill, 2000)). I have remained in constant touch with legal developments in the Kingdom through my research, through numerous friends and colleagues (many of whom have been students or visitors at the Islamic Legal Studies Program), and through supervising graduate student research and writing on Saudi law. Since 1987 I have visited the Kingdom numerous times, and conducted many interviews with judges, government officials, and legal scholars. I have also been involved as an expert witness and consultant in numerous cases involving Saudi law, and can provide a list of these cases if needed.

4. From years of academic study, from a year's private tutorial in spoken Arabic in Egypt, and from conducting my research in Arabic, I have developed fluency in the study and discussion of Islamic legal matters in Arabic. Arabic language ability is essential to gain any precise knowledge of the basic law and practice in Saudi Arabia, since there are no translations into English of the Islamic law treatises commonly consulted in Saudi Arabia and, more importantly, because one cannot rely solely on any translation, since these

are intricate works that rely heavily on nuance, implicit structure, and technical terminology to convey a great deal of law concisely.

The Law and Legal System of Saudi Arabia

5. The basic law of Saudi Arabia is Islamic law, in the sense that Islamic law determines both the constitution and the general or common law of the Kingdom. The legal system of Saudi Arabia remains at base a traditional Islamic one, meaning that it differs in structure from both the civil and common law systems familiar in the West. Islamic law is drawn in principle from the Qur'an and the reported legal decisions of the Prophet Muhammad, but in day-to-day terms is known from scholarly texts, many written centuries ago yet possessing even today great influence. Indeed, the Islamic law and legal system are well-known to be based on juristic or scholarly opinion, rather than on the precedential authority of court decisions or on extensive legislation or codification. Islamic legal scholars continue to reinterpret and develop the law to meet modern conditions. The Islamic courts of Saudi Arabia are independent and vigorous in their application of the Islamic law, and, while relying on the works of private jurists themselves possess much authority to develop and reinterpret the legal rules and concepts they apply, since they themselves are religious legal scholars.

6. Islamic law as known from scholarly interpretations and writings is therefore of fundamental relevance to determining the law of Saudi Arabia in all spheres. But Islamic constitutional law doctrine allows the state to make its own laws to supplement the Islamic rules that are the product of scholarly interpretations. In Saudi Arabia such a statute is called a "*nizam*," meaning "regulation," and is issued by royal decree following consideration by the Council of Ministers and the Consultative Council. Such statutes have been particularly needed to regulate legal issues and institutions arising only in modern times. Many such statutes have been issued, but most are short and on discrete and narrow topics; none even resembles anything that might be described as a comprehensive code such as a civil, com-

mercial, or criminal code. An example of a relatively elaborate *nizam* is the Companies Law, Decree No. M/6 (dated 22/3/1385 in the Hijra calendar, corresponding to July 20, 1965), which provides for the existence in Saudi Arabia of modern companies and corporations alongside the partnerships known to the classical Islamic law. It should be noted, however, that the Islamic courts of Saudi Arabia are independent-minded in the application of *nizams*, and sometimes decline to apply them in favor of rulings based on the constitutionally superior Islamic law when they believe the statutes conflict with Islamic legal principles.

7. As to the scholarly law itself, this law exists in the form of various "schools of thought" [*madhhab*]. In the Sunni branch of Islam prevailing in Saudi Arabia, there are four separate "schools" or corpuses of the Islamic law, which are similar in essentials though differing in many doctrinal details. Saudi judges are trained in the Hanbali school and usually follow in their decisions the majority view of that school (schools usually offer multiple views on any issue but usually name one view as dominant). Saudi judges are also in principle free to continue to develop Hanbali opinions to meet the needs of modern times, and also to adopt a minority view of the Hanbali school or a view even of another Sunni school if they are convinced that such a view is better supported in the case before them. But most judges hew conservatively to Hanbali views, so that it remains the case that the best means to know Saudi civil law on any issue is to learn the relevant rules and principles of the Hanbali school on that issue.

8. The law of the Hanbali school, which is intricate and highly developed, is known by consulting certain standard works considered authoritative in the courts of Saudi Arabia. Particularly important are two works by Mansur al-Bahuti, a 17th century scholar, entitled *Kashshaf al-qina*, published in four volumes, and *Sharh al-muntaha*, published in three volumes. Parts of these have been codified unofficially in the work by Ahmad al-Qari (d. 1940), *Majallat al-ahkam al-shar'iyya*, ed. A. 'Abu Sulayman and M. 'Ali

(Jidda: Tihama Publications, 1981). There are many other works of reference, most importantly Muwaffaq al-Din Ibn Qudama (d. 1223), *al-Mughni*, published in many editions (e.g., Beirut: Dar al-Kitab al-'Arabi, 1983 in 12 volumes with indexes). I own these works and they are all available in many libraries in the United States as well as elsewhere in the world. These are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.

9. Due to the fact that judicial decisions are not in themselves a source of law (rather revealed texts and scholarly opinions are), and due to the relative paucity of legislation, particularly on matters of private or civil law including contract law, it is often more difficult in Saudi Arabia than in other counties to know or predict the contemporaneous law as applied by courts, or even by a particular judge or court. This difficulty can, however, easily be exaggerated by outsiders unaccustomed to the system. In fact, a great deal can be known about the law to be applied on most issues by consulting, in addition to the relevant *nizams*, relevant Islamic legal texts and, perhaps most importantly, understanding the basic legal principles that animate those texts. A court judgment, while not itself an authoritative source of law, is at least evidence that the particular legal position upheld in it has found favor in a court; insofar as such a decision states its reasoning, it is also evidence that among judges the expressed line of legal reasoning can be found valid and persuasive. It is true, however, that with the exception of three volumes of decisions of the Board of Grievances published in the 1980s, court decisions in Saudi Arabia are not published or even open to public inspection.

10. As to contract law, Islamic law offers a law of contracts rather than a general law of contract; in other words, it presents itself in the form of detailed, complexly interrelated rules for a number of basic contract types such as sale, lease, agency, partnership, etc. Historically, contracts were drafted to comply with one or another of these contract types and the detailed rules that governed them. In medie-

val times only a few scholars advocated the idea that parties contract freely in the sense of creating their own contracts and ignoring the detailed rules of the law books. A particularly liberal position was that of the renowned Hanbali scholar of the 14th century, Ibn Taymiyya, who called for upholding all contractual agreements so long as they do not come into conflict with a basic prohibition or fundamental principle of the Islamic law. Seeking to adopt a readily modernizing stance on this basic issue, Saudi Arabian judges and scholars have enthusiastically adopted Ibn Taymiyya's view, and declare that parties are free to make their contractual arrangements without needing to parrot the existing Islamic contractual types, as long as their arrangements respect fundamental principles of the Islamic law, including the contract law. In this way, Saudi law has opened the way for an indirect modernization of its day-to-day law of contract through the medium of encouraging parties to create by their private agreements appropriate legal structures for their interactions, provided that they respect the basic principles of Islamic law, particularly those concerning property and contract.

11. The Saudi Arabian court having the general jurisdiction over such disputes as the one involved in this case is the Board of Grievances. I have copies of and have studied many decisions of this court and have discussed the jurisprudence of the Board with a number of its judges during visits to the Kingdom.

Factual Basis for Opinion

12. In preparing this opinion I reviewed certain documents and pleadings concerning the case. A list of these is attached as Appendix 2.

Issues Presented for Opinion

13. In the following I address a number of issues of Saudi law relevant to the case:

A. What is Saudi law and practice for deciding the meaning of a provision of a written contract, the interpretation of which is contested by the parties?

1. As to interpretation of contracts

2. As to the legal status of writings as contracts

3. Relevance of parol evidence in the interpretation of written contracts

4. Subsequent amendments to written contracts

B. What is the basic understanding under Saudi law of joint ventures and of the contractual relationship between the parties in such ventures? In particular,

1. To what extent is a joint venture agreement binding on the parties?

2. May parties to a joint venture agreement subsequently alter the terms of agreement by subsequent contractual agreements, written or oral, or by practice course of dealing?

C. What is Saudi law on damages, particularly as to

1. Consequential damages

2. Punitive or exemplary damages

3. Pre-judgment interest?

D. Under Saudi law on whom falls the burden of proof to show a breach of fiduciary duty?

* * *

Issue C. What is Saudi law on damages, particularly as to

1. Consequential damages.

29. Saudi provisions on damage for breach of contract are more limited or restrictive than those prevailing in most legal systems. To speak only in very general terms, the basic principles of Islamic law deriving from the revealed pro-

hibitions of *gharar* or uncertainty and of *riba* or usury are seen as barring recovery for damages from breach that are in any respect speculative or pertaining to the future. Generally damages for breach of contract are designed not to put parties into the position where they would have been if the contract has not been breached (expectation damages)—a standard that requires speculation based on a counterfactual assumption—but rather to put them in the position they were in prior to entering into the contract, including, in many cases, compensation for actual, out-of-pocket losses caused by the breach (roughly, reliance and restitution damages). Specific facts about claims of damages are needed to determine, by weighing them against these principles, if they would be allowed.

2. Punitive or exemplary damages

30. Islamic law as applied in Saudi Arabia does not permit assessment of punitive or exemplary damages, since these are seen as unquantifiable and speculative in the extreme, thus offending against the fundamental principles prohibiting depriving anyone of his or her property based on a claim affected by *gharar* or excessive uncertainty.

3. Pre-Judgment Interest

31. Islamic law as applied in Saudi Arabia courts categorically and consistently rules out the payment of interest at all, whether as penalty or as compensation for delay in the payment of a sum of money. This is true for post judgment delays, for pre judgment interest, and even for payment of loans in general. This is considered to be the straightforward application of the Qur'anic principle prohibiting *riba* or usury.

Issue D. Under Saudi law on whom falls the burden of proof to show a breach of fiduciary duty?

32. Under Islamic law various contracts including agency and partnership are contracts of "trust" or "*amana*" in that in such contracts one party (the agent, partner, etc.) has the responsibility to meet a duty of care in his possession

or custody of the goods of the other party (the principal, the partnership, etc.). This is an Islamic counterpart to the US fiduciary relationship that is relevant to the present dispute. It should be noted that Islamic law often assigns the burden of proof relevant to a claim of breach of fiduciary duty not on the person trusted (the agent, the partner, etc., to justify his act as not a breach of duty), but rather on the person who owns the property held in trust (the principal, the other partner or the partnership, etc., to show that the act in question was a breach of duty). This outcome is discovered in numerous casuistic rulings laying down the burden of proof in various situations arising in agency or partnership. Such rulings taken from classical books serve as guidance to judges in employing their discretion in determining, on the basis of all the circumstances of an actual case, on whom various burdens of proof should fall, i.e., who will be taken as successful as to any issue as to which the available evidence proves to be lacking or unconvincing. In most cases, if the judge follows the examples laid down in the Islamic books, it will be the fiduciary that is given the benefit of the doubt, not the principal.

* * *

The above is a summary of doctrines of Islamic and Saudi law that, on my present knowledge of the facts and claims in this case, appear highly relevant. If other issues of Saudi law should arise or a closer focus on certain facts or further explanation of Saudi law should be needed, as discovery continues or if the parties explore additional issues, then I would be glad to expand on the discussion offered above.

/s/ Frank E. Vogel
Frank E. Vogel

APPENDIX 1

FRANK EDWARD VOGEL

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71 Old Farm Road
Concord, MA 01742
978-341-0751
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Born June 18, 1949, Bismarck, North Dakota, USA
Married, two children

EDUCATION

Ph.D. in Law and Middle Eastern Studies (Islamic Law), 1993
Harvard University, Law School and Graduate School of Arts and Sciences (Center for Middle Eastern Studies).

J.D. (*magna cum laude*), 1975
Washington College of Law, American University, Washington, D.C.

A.B. (*cum laude*), Applied Mathematics, February 1972; includes one term post-degree study in undergraduate minor of Near Eastern Languages and Civilizations Harvard College

CAREER

Custodian of the Two Holy Mosques Chair in Islamic Legal Studies, Harvard Law School, 1993–present
Adjunct Professor of Islamic Legal Studies, Harvard Law School, 2000–present
Director, Islamic Legal Studies Program, Harvard Law School, 1991–present
Assistant Professor of Law, Harvard Law School, 1991–2000
Ezra Ripley Thayer Lecturer on Law, Harvard Law School, July 1987–June 1991

Attorney, Jones, Day, Reavis & Pogue, Riyadh, Saudi Arabia Office, January 1986–July 1987
Teaching Assistant, Harvard University, September 1980–January 1981
Summer associate, Coudert Brothers, New York, June 1979–August 1979
Associate, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., November 1976–August 1978
Law Clerk to Hon. George L. Hart, Jr., Judge, United States District Court for the District of Columbia, October 1975–October 1976

AWARDS AND FELLOWSHIPS

Fulbright-Hays Fellow, 1983-84, Riyadh, Saudi Arabia
Fellow, 1981-82, American Research Center in Egypt
Alternate, 1981-82, Graduate School of Arts and Sciences Merit Scholarship
National Defense Education Act Title VI Fellowships, 1978-82
Harvard Law School Scholarships in Islamic Legal Studies, 1979-80, 1980-81
Law School Honor Society, 1975
National Merit Scholar, 1967-71
Harvard National Scholar, 1967-71

PROFESSIONAL MEMBERSHIPS

District of Columbia Bar (admitted November 1975)
American Oriental Society
American Society of International Law
International Academy of Comparative Law
International Law Association (US member of Committee on Islamic Law and International Law and Chair of American Branch Committee on Islamic Law and International Law) Middle East Institute
Middle East Studies Association
Editorial Board, *Arab Law Quarterly*
Advisory Board, *Islamic Law and Society*

RESEARCH CONDUCTED ABROAD

October 1981-November 1982, Cairo, Egypt research on Egyptian proposals to codify Islamic law; training in spoken Arabic
February 1983-July 1987, Riyadh, Saudi Arabia: dissertation research on Islamic legal system of Saudi Arabia; included many months of attendance in Saudi courts; interviews with scholars, judges, and government officials

LANGUAGES

Arabic: High proficiency in reading, writing and speaking.
French, German: Proficiency, reading

CONSULTING

Served as an expert witness and consultant in numerous legal cases involving Islamic law and the laws of Saudi Arabia, Afghanistan, Egypt, Jordan, UAE, Qatar, and Pakistan.

PUBLICATIONS

BOOKS

with Samuel L Hayes, III, *Islamic Law and Finance: Religion, Risk and Return* (The Hague and Boston: Kluwer Law International, 1998)

Islamic Law and Legal System: Studies of Saudi Arabia (Leiden and Boston: Brill Academic Publishers, 2000)

ARTICLES

"Banking Disputes in Saudi Arabia: An Analysis of Decision 822," in *Middle East Executive Reports*, ix/4 (April 1986), 21-24

"The Closing of the Door of Ijtihad and the Application of the Law," in *The American Journal of Islamic Social Sciences*, x/ 3 (Fall 1993), 396-401

"Is Islam Compatible with Democracy? A Comparative Perspective," in *Under Siege: Islam and Democracy*, ed. Richard W. Bulliet (Middle East Institute, Columbia University, Occasional Papers 1, 1993), 93-105

"The Role of *Shari'a* in the Modern Legal Systems of the Middle East," in *Private Investment Abroad—Problems and Solutions in International Business in 1994*, The Southwestern Legal Foundation Proceedings of the 36th Annual Symposium, 14-1 to 14-18

"Prospects for a Restatement: The Codification of Commercial and Contract Law in Saudi Arabia," in *Commercial Law in the Middle East*, ed. Hilary Lewis Ruttley and Chibli Mallat (London: Graham & Trotman, 1995), 31-38

"The Islamic Legal System of Saudi Arabia: A Primer for U.S. Business," in *Middle East Insight*, xi/ 6 (1995), 93-96

"*Salb* [Crucifixion]," in *Encyclopaedia of Islam [New Edition]* (Leiden: EJ. Brill, 1996) 935-936

"The Complementarity of *Ifta'* and *Qada'*: Three Saudi Fatwas on Divorce," in *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. M. Khalid Masud, Brinkley Messick, and David Powers (Cambridge: Harvard University Press, 1996), 262-269

"*Siyasa shar'iyya* [Governance in Accordance with Divine Law]," in *Encyclopaedia of Islam [New Edition]* (Leiden: EJ. Brill, 1997), 694-696

"Islamic Governance in the Gulf: A Framework for Analysis, Comparison and Prediction," in *The Persian Gulf at the Millennium: Essays in Politics, Economy, Security and Religion*, ed. Gary G. Sick and Lawrence G. Potter (New York: St. Martin's Press, 1997), 249-295

"Conformity with Islamic Shari'a and Constitutionality under Article 2: Some Issues Theory, Practice, and Comparison,@ in *Democracy and the Rule of Law*, ed. Eugene Co. and Adel Omar Sherif (The Hague: Kluwer Law International, 1999), 525-544

"The Rule of Law in Saudi Arabia," in *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process*, ed. Eugene Cotran and Mai Yamani (London and New York I.B. Tauris and Co., 2000), 128-136

"The Contract Law of Islam and of the Arab Middle East," in *International Encyclopaedia of Comparative Law* (250 pages, forthcoming)

"The Trial of Terrorists under Classical Islamic Law," in *Harvard International Law Journal* xliii/ 53-64 (2002)

Book Reviews:

Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*, in *American Journal of International Law* lxxxiii/1 (January 1989), 227-230

Baber Johansen, *The Islamic Law of Land Tax and Rent*, in *Middle East Studies Association Bulletin*, xxiii/2 (December 1989), 212-214

C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, in *International Journal of Middle East Studies*, xxiii/ (May 1991), 265-267

Nicholas Hear, ed , *Islamic Law and Jurisprudence*, in *The Fletcher Forum of World Affairs* xv/ 2 (Summer 1991), 210-213

LECTURES AND PRESENTATIONS

February 28–March 30, 1984 – United States Information Agency, American Participant Tour, Tour to Sudan, Kuwait, Pakistan, Bangladesh, Jordan, North Yemen (delivered lectures to diverse audiences on the subject of contemporary Islamic law and its application, and met with numerous scholars, officials and leaders of Islamic movements)

April 3, 1989 – University of Michigan, Center for Near Eastern and North African Studies, Islamic Law Lecture Series, Islamic Law Applied: Observations from Saudi Arabia"

April 3, 1989 – University of Michigan Law School, Islamic Law Lecture Series, "Islamic Criminal Law in Saudi Courts"

May 4, 1989 – Harvard University, Graduate School of Education, Islamic Legal Perspectives on the Rushdie Affair"

October 23, 1989 – Boston College, McCarthy Lecture Series, panel presentation with Profs. John Noonan (visiting professor, Harvard Law School), John Mansfield (Harvard Law School), and Joseph Stern (Hebrew College), "Christian, Jewish, and Muslim Approaches of Religion and Law in American Society"

March 16, 1990 – Harvard University, Kennedy School, Seminar Series, Institute for Social and Economic Policy in the Middle East, Islamic Criminal Law in Saudi Arabia"

April 18, 1990 – Harvard University, Center for Middle Eastern Studies, CMES Forum, "Islamic Criminal Law in Saudi Arabia"

March 3, 1991 – American Oriental Society Conference, "Proposing a Schema for Comparative Inquiry into Islamic Law and Legal Systems"

May–June 1991 – Month-long lecture tour in Saudi Arabia, Egypt, Abu Dhabi, Oman and Bahrain, in the last three countries as USIS American Participant (delivered lectures to diverse audiences on the subject of Islam and human rights, including issues of popular participation in government, and met with numerous scholars, officials and leaders)

March 13, 1992 – American Oriental Society Conference, "The Closing of the Door of *Ijtihad* from the Perspective of the Application of the Law"

October 9-10, 1992 – Symposium – Aspects of the Interrelationship between Law and Religion in Society (Antiquity–Twentieth Century), Robbins Collection, University of California at Berkeley, "Some Distinctions between Law and Religion in Islamic Thought and Practice"

February 17, 1993 – Harvard Center for Middle Eastern Studies, Islam and Economics Discussion Group, "Fundamental Texts on *Riba* (Interest) and *Gharar* (Risk)"

June 19, 1993 – Columbia University Conference, Islam and Democracy, "Two Common Errors in Assessments of the Compatibility of Islam and Democracy"

June 24, 1993 – London University, School for Oriental and African Studies Conference on Commercial Law in the Middle East, "Prospects for a Restatement: The Codification of Commercial and Contract Law in Saudi Arabia"

September 24–25, 1993 – Yale University, Conference on Islamic Law and Religion, "Law and Religion in the Saudi Courtroom"

November 6, 1993 – Yale Law School, Schell Center, Conference on Islam and Human Rights, commentator

March 26, 1994 – Institute of Islamic and Arabic Sciences in America, Washington, DC, Conference on Islamic Studies in the US, "Collaboration of Law and Islamic Studies Faculties: Potential Benefits for the Understanding of Islam"

June 21–22, 1994 – Southwestern Legal Foundation, International and Comparative Law Center, Symposium on Private Investments Abroad, Dallas, TX, "The Role of the Shari'a in the Modern Legal Systems of the Middle East"

July 18–20, 1994 – Gulf2000 Conference, Castelgandolfo, Italy, "How Does Islam Govern? Diversity and Innovation in the Islamic States of the Gulf"

March 18–20, 1996 – Conference on Law and Society in Morocco, Mohammed V and Harvard Universities, Rabat, Morocco, "Legal Pluralism Within Shari'a Doctrine and Institutions"

November 2, 1996 – Institute of Islamic and Arabic Sciences in America, Herndon, VA, Conference on Islamic Studies in the US, "The Importance of Muslim Practice for the Comparative Study and Teaching of Islamic Law"

October 22–23, 1997 – London University, School of Oriental and African Studies, Centre of Islamic Studies, Symposium on Criminal Judicial Procedure, "Practicability of the System of Evidence in Islamic Law"

October 24, 1997 – London University, School of Oriental and African Studies, Centre of Islamic and Middle Eastern Law, Rule of Law Lecture Series, "The Rule of Law in Saudi Arabia"

December 6–9, 1997 – Supreme Constitutional Court of Egypt, Conference on Democracy and the Rule of Law, Cairo, Egypt "Conformity with Islamic Shari'a as a Constitutional Standard: Some Issues of Theory, Practice, and Comparison"

April 2, 1998 – Mellon Seminar: The Crafting of Legal Opinion (Fatwas) in Islam, Princeton University, "Shifting Roles of King and 'Ulama' in Saudi Criminal Law: Fatwas Legislating New Capital Crimes: 1981–1992"

November 16, 1999 – American Bar Association, Middle Eastern Law Committee, on Dispute Resolution and the Arab Middle East "Consequential Damages: A Comparative Analysis of Arab Civil Codes"

December 7, 2000 – Library of Congress, Globalization and Law in Muslim Societies: "Persistence of Islamic Commercial Law"

February 15, 2001 – Ohio State University, College of Law, "Some Anomalies of Islamic Contract and Commercial Law

April 6-7, 2002 – Keynote Speaker, "*Ijtihad* in Islamic Finance," Fifth Harvard University Forum On Islamic Finance.

– revised April 8, 2002

DOCUMENTS REVIEWED BY EXPERT WITNESSES
SABIC Re: DELAWARE

Frank E. Vogel
Assistant Professor of Law
Director, Islamic Legal Studies Program
Harvard Law School, Hauser Hall, 314
Cambridge, MA 02138

Description	Date of Doc.	Bates No.
UCC PE Technology License Agreement between Saudi Basic Industries Corporation and Al-Jubail Petrochemical Company	11/18/1980	K014039-014125
SABIC-Agreement	09/24/1980	SABIC024707-024868
Memorandum of Understanding Respecting Saudi Basic Industries Corporation - Union Carbide Corporation Agreement of September 28, 1980	09/28/1980	DEL-SABIC005837-5840
First Amended Complaint for Declaratory Judgment	09/28/2000	—
Answer to First Amended Complaint and Counterclaims	01/14/2002	—
Plaintiffs Response to Defendants' Answer to First Amended Complaint and Counterclaims	02/04/2002	—
Answer to First Amended Complaint and [Amended] Counterclaims	05/15/2002	—
Plaintiffs Answer to Defendants' Amended Counter-	06/19/2002	—

Description	Date of Doc.	Bates No.
claims		
Joint Venture Agreement Between Saudi Basic Industries Corporation and Exxon Chemical Arabia, Inc.	04/26/1980	ESNJ00034090-00034130
Joint Venture Agreement Between Saudi Basic Industries Corporation and Mobil Yanbu Petrochemical Company, Inc.	04/19/1980	DELEM0011537-0011584
Yanpet Memorandum of Association	04/19/1980	DELEM0003484-3534
Kemya Memorandum of Association	04/26/1980	ESNJ00018922-18950

APPENDIX N

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	Civil Action No. 00C-07-161 JRJ
v.	)	
MOBILE YANBU PETRO-CHEMICAL COMPANY, INC., *et al.*,	)	
Defendants.	)	

SECOND DECLARATION OF WAEL B. HALLAQ

WAEL B. HALLAQ, being first duly sworn according to law, deposes and says:

1. I submit this report in response to certain statements made in Frank E. Vogel's Affidavit ("Vogel Affidavit"), dated September 16, 2002, and in supplementation of my September 13, 2002 Expert Report and Declaration. It is my view that the Vogel Affidavit does not include specific opinions as to the application of Islamic law to the facts of this case: to the extent SABIC attempts to supplement the Vogel Affidavit with such specific opinions, I reserve the right to respond to such opinions.

* * *

9. I have reviewed par. 29 of the Vogel Affidavit regarding consequential damages. I do not read anything in par. 29 that is inconsistent with the opinions I expressed in pars. 16-17 of my September 12, 2002 Expert Report. To the extent there is an intention to suggest that Islamic law

would not permit ExxonMobil to recover damages under the model that I previously described, I stand by my prior opinion.

10. Finally, par. 32 of the Vogel Affidavit discusses burden of proof in the context of fiduciary duty claims. Notwithstanding that the party claiming a breach of the duty must generally come forward with supporting evidence, in this case ExxonMobil will satisfy that duty if it demonstrates that SABIC charged KEMYA and YANPET more than SABIC's actual costs for the licensed technology. A Saudi judge hearing such evidence would then place on SABIC the burden of explaining that it did not breach its duties despite the cost discrepancies.

/s/ Wael B. Hallaq
Wael B. Hallaq

October 16, 2002
Date

[Attachment omitted.]

APPENDIX O

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	Judge Jurden
v.	)	Civil Action No. 00C-07-161 JRJ
MOBILE YANBU PETRO-CHEMICAL COMPANY, INC., -and- EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	
CITY of CAMBRIDGE	)	
STATE of MASSACHUSETTS	):ss.:	

REBUTTAL AFFIDAVIT OF FRANK E. VOGEL

FRANK E. VOGEL, being duly sworn, does hereby depose and state as follows:

1. This affidavit is offered in response to several expert affidavits (those of Prof. Wael Hallaq of September 12 and 13, 2002 and Mr. Kevin Taecker of September 14, 2002) have been filed on behalf of the defendants in this case.

2. I have made every effort to review the various references or citations in Prof. Wael Hallaq's declarations dated September 12 and 13, 2002. Unfortunately, I have not been able to locate with exactitude several of these

citations because his editions differ from any of the editions available to me at Harvard University libraries or in my own collection. (Arabic editions of the same works appear frequently, with differing paginations.) This problem arose mainly for Buhuti, *Kashshaf al-qina*; Shirazi, *al-Luma'*, Ibn Qudama, *al-Kafi*; Ibn Qudama, *Rawdat al-nazir*, Jassas, *al-Fusul*; Ibn Taymiyya, *al-Fatawa al-kubra*. In many cases I have tried to discern which pages corresponded to his references. I expect that, as observed for other similar references I was able to consult, these added references simply parallel other references I have been able to consult. I would be glad to examine these sources as well if copies of them could be supplied.

Usurpation

A. General

3. In analyzing the claim made by ExxonMobil in this case, alleging that SABIC in its license of Unipol technology to the joint ventures breached Art. 6..3 in the joint venture agreements by charging the ventures in excess of its own costs in acquiring the technology, Prof Hallaq depends entirely on characterizing this breach as a particular tort under Islamic law called "*ghasb*," usually translated in English as "usurpation."

4. Prof Hallaq's use of the term in this context is not correct under Hanbali law or Saudi law. It is based on highly theoretical arguments, among them several invoking highly general statements from the Qur'an or the Sunna of the Prophet that apply across vast areas of Islamic law. It is also untenable in that it leads to a result that, if it ever were to be adopted, would go far to overturn Saudi courts' long-standing, determined opposition to pre-judgment interest. The basic idea that Prof. Hallaq invokes (invoking the broader damage measure allowed by some schools for usurpation to expand contract damages) is well known among those seeking to reform the old law. If valid, it could poten-

tially apply to a great many everyday legal disputes. Yet, in my knowledge of this legal system based on a close familiarity stretching back to 1982, and despite the fact that any outcome such as he contemplates would attract a great deal of attention, I have never heard of any such result.

B. Issue of Liability under Usurpation Law

5. In characterizing this case as one involving *ghasb* or usurpation, Prof Hallaq passes over in silence other far more common characterizations of the alleged facts under Islamic law. To explain this situation, some basics of partnership law (the law applying to joint ventures and companies in the absence of relevant statutory provisions) are needed. As mentioned in my earlier affidavit, partners bear toward each other a relationship of agency. This entails that each is as to the others a "trustee" or "*amin*," meaning that he must observe a particular duty of care (called "*amana*" or trusteeship) toward the other partners' shares in the partnership property. That duty of care is fixed by two things: one, a standard of ordinary or customary care, similar to what we would call a "reasonable person" standard, imposed by law; and two, any applicable instructions given by one party to the other and accepted as the basis for their ongoing partnership relationship—i.e., the partnership agreement in its then-current form. Breach of this duty of care is referred to as "*ta'addi*," meaning literally "overstepping," "transgression," but legally meaning "breach." Ordinarily a trustee is liable for damage or loss to property in trust only if he (a) breaches the above standard of care; and (b) his act directly causes the claimed loss (so he is not liable for the losses otherwise caused, such as by act of a third party or of God). The ordinary measure of damages for a trustee's breach of duty is to restore the property lost or its value, but not any profits (*ribh*) or use-value (rent or usufruct, *manfa'a*) lost due to the loss of the property.

6. *Ta'addi* is the term for garden-variety breaches of the duty of care in *amana* relationships to property, whether or not those breaches are intentional. It rarely matters, particularly for damages purposes, whether such a breach is intentional or merely negligent.

7. Prof Hallaq prefers to call any such breach, or at least the breach in this case, the emotive term "*khiyana*" or deception (which he then equates with usurpation or *ghasb*, see paragraph 10 of September 12 declaration). The term *khiyana* is far more rarely used in legal contexts and with a much less precise meaning than is *ta'addi*. *Khiyana* is often associated, as in a number of Prophetic texts, with *amana* as we might associate the word "betrayal" with "trust." But, again, the ordinary term used for breach of *amana* in partnership, agency, etc., is *ta'addi*, not *khiyana*. Compare *al-Mawsu'a al-fiqhiyya* [Islamic legal encyclopedia]" 20:185 (on *khiyana*) with ibid., 12:232 ff. (on *ta'addi*).

8. Some basic knowledge about the tort of *ghasb* or usurpation is needed. This tort is defined as "the seizure ... —according to a customary understanding (*'urfan*)—of the property of another by force without right." Buhuti, *Sharh*, 2:399. See also idem, *Kashshaf*, 4:76; Sharma, *Ahkam al-ghasb fi al-fiqh al-islami* [Doctrine of usurpation in Islamic law], 26-36 (various schools). Al-Buhuti explains that the term "by force," "*qahran*," is used to exclude cases of theft (*sariqa*, taking by stealth) and embezzlement or misappropriation (*ikhtilas*). *Sharh*, 2:399. The famous Lebanese scholar Subhi Mahmassani, in his work on the Islamic law of obligations, states that the requirement of forcefulness distinguishes usurpation also from other wrongs, such as denial of the rights of others (*inkar al-haqq*), fraud or deception (*ghishsh*), and betraying trust (*khiyana*). The term "forceful" excludes takings that are deceptive or secretive. IMahmassani, *al-Nazariyya al-'amma li-al-mujibat wa-al-'uqud fi al-shari'a al-islamiyya* [The general theory of obligations and contracts in the Is-

lamic shari'a), 156; see also *al-Mawsu'a al-fiqhiyya*, 228-229. Other scholars, particularly Hanafis, make this idea more explicit by requiring that usurpation occur openly and notoriously (*jahran* or *mujaharatan*). Mahmassani, 157: Sharara, 26-36. As for the term "without right," it entails an intent to transgress the rights of others. Sharara, 63. Mahmassani explains that this requirement once again distinguishes usurpation from secretive takings such as theft. P. 157. *Khiyana* is not identical to *ghasb* or usurpation. *al-Mawsu'a al-fiqhiyya*, 20:185.

9. Some forms of *ghasb* arise that have a superficial similarity to Prof. Hallaq's thesis but are actually distinguishable. Sometimes a party's betrayal of a confidence or trust placed in him—in situations sometimes described using the terms *amana*, the related term *i'timan*, or *khiyana* (faithlessness, treachery, betrayal)—can be a form of *ghasb*, or constructive *ghasb*. Sharara, 66-67. For example, if one party is entrusted with holding property for another, as by deposit (*wadi'a* meaning "deposit" or "bailment"), and then that party denies (*juhud*) that the property was entrusted to him, he has in effect seized the property for himself. Note that while this act falls within the broader concept *ta'addi*, it also meets all the requirements of usurpation—it is forceful, with wrongful intent, against right, open and notorious, etc.—being extraordinary only in that possession of the goods passed originally with the depositor's permission.

10. In sum, as shown by the foregoing, Prof Hallaq is incorrect in applying the tort of usurpation to this situation. Defendant alleges that SABIC improperly took property from the joint ventures in breach of the terms of the partnership contract, which could include terms arising by operation of law as well as terms fixed by the parties' agreement. On the facts of this case, even as apparently alleged by the defendant (in its counterclaims for breach of contract), such a breach could arise

from an erroneous but good-faith interpretation of the contract—which is obviously not usurpation. The defendant also frequently alleges that plaintiff practiced knowing deception (something needing proof under Islamic law). (Prof Hallaq fails to distinguish these two cases, the innocent breach and the deliberate deception, and brings both under the terms "*khiyana*" and "*ghasb*".) But, again, even if the taking were by knowing deception, even fraud, the breach here is distinct from usurpation. Usurpation is a forceful (and therefore not secretive or deceptive) taking, while the alleged taking here is at most disguising misappropriation as something legitimate, or seeking to hide or obscure a breach of duty or violation of the terms of the contract. However improper such behavior might be, under Islamic law it is not usurpation. It falls under the general rules concerning *ta'addi*.

11. Saudi judges see many such cases of partnership disagreements, and I have never heard of one being characterized as usurpation.

C. Issue of Measure of Damages under Usurpation Law

12. Even if we were to assume the facts as alleged by defendant, and, like Prof. Hallaq, were to assume further that usurpation provides the rule of this case (which is incorrect), we would still find that under the facts of this case the recovery remains no different than it would be according to the garden-variety *ta'addi* standard. To understand this, we must consider the rules of damages for usurpation or *ghasb*.

13. As a knowing, wrongful, and forceful invasion of the sacred property rights of others, usurpation is considered a major sin and entails an especially high degree of liability. Damages may be awarded that exceed those for other causes of action such as breach of contract or of "trusteeship" (*ta'addi*), fraud, knowing denial of legitimate rights of others, refusal to pay sums owed, or em-

bezzlement. All schools require the usurper to return either the property taken or its value or, if it is a fungible, its equivalent. The usurper is liable to return the property or its value even if it has been destroyed due to no added fault on his part (such as by act of God). Also, some schools—and the Hanbalis are among the strictest of these—pursue the usurper even for compensation for the use value of the usurped goods during the period of the usurpation (as long as the property exists—this recovery ceases if the property is destroyed or lost[1]) and for certain actual profits the usurper reaped from the usurped goods during the usurpation (if these can be traced and are concretely known). (These last points are explained further below, in paragraphs 16 and 17.) Note how the measure of damages for usurpation is potentially broader than damages for ordinary breach or *ta'addi*, in that in the latter case the breaching party is liable only for losses directly caused by his behavior (not acts of God or third parties), and not for the losses of profits or utility values of property lost to the partnership.

14. Before going further I must also explain three basic principles of Islamic law, all of which are cardinal tenets in the jurisprudence of Saudi courts. First, in Islamic law money is treated very differently than other property in many ways due to the intense preoccupation with avoiding prohibited interest and usury. (Almost as restricted are other forms of "*ribawi*" property, i.e., property subject to usury restrictions, which includes certain other fungibles or foods, depending on the school of thought.) Vogel, *Islamic Law and Finance*, 72-87. Second, one respect in which money (and other *ribawi* goods) is different from other property is that in itself it has no utility value [*manfa'a*], i.e., no rent is conceivable for it. Thus it is different from, e.g., a car or land which

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[1] *al-Mawsu'a al-fiqhiyya*, 31:243; Vogel, "The Contract Law of Islam and of the Arab Middle East," 145.

are understood to generate a usufruct that is property and has a determinable value, and which therefore can be compensated for by payment of a fair rent. Similarly, in Islamic law money is considered sterile in that in and of itself it cannot bear fruit or growth [*nama'*]. These results are dictated or related to the fundamental prohibition of interest and usury. Ibid. Third, Islamic law vigorously opposes the award of damages that are in any way speculative or depend on counter-factual assumptions, such as claims for lost profits from breach. Vogel, "The Contract Law of Islam and of the Arab Middle East," 133-150. This result traces to the law's prohibition of undue uncertainty or *gharar* as mentioned in my last affidavit.

15. Because of the first and second of these principles, it is perfectly clear that, even in a case of usurpation, there can be no recovery for the utility value of money. Thus, all analogies to profits from usurped goods such as the fruit borne by trees, a harvest from planted wheat, or compensation for the usufruct of a building in the amount of its fair rent, are entirely inapplicable to usurped money.

16. Usurpation law does allow one way in which recovery can be had for money. In a narrow result, relied on by Prof Hallaq, al-Buhuti, in one of two books he authored which are the most important practical manuals of Hanbali law in use in Saudi Arabia, writes as follows:

> If a usurper trades in a specific or concrete object ['*ayn*, which can include specific coins] that was usurped, or in the specific object ['*ayn*, such as specific coins] of its price [i.e., after selling the object], in that he buys or sells and there appears a profit, or he buys with it something and there appears a profit, and that profit still exists [i.e., is present, unused], then the profit and the goods that the usurper purchased—even if the purchase was made on credit with the intent to pay its price with the

> usurped property or with its price (after its sale) and he does so—belong to the owner of the usurped property and not their usurper. al-Buhuti, *Sharh*, 2:422; see also idem, *Kashshaf*, 4:113; Ibn Qudama, *al Mughni*, 5:419.

17. What this allows for, at most, is the tracing of the actual, concrete, fully determined profits from specific usurped property, including specific pieces of currency or coins. There is no room left here for speculation about what was in fact reaped as profits. To do so would violate the third general principle of Islamic law mentioned above. Fastidiousness about this is obvious in discussions about such recoveries in the Hanbali books—such as when recovery is denied if the profits no longer are present (see quote above); when the usurper does not "intend" to pay for acquired goods with usurped money but does so anyway (see quote above); when it is less the property itself or its value that issues in the gain and more the usurper's lawful efforts (*Kashshaf*, 4:89); or when the usurper is entitled to certain costs (Sharara, 225). Also instructive is the following passage from al-Buhuti's chapter on usurpation:

> > The objective of damages is to secure the owner's right by obligating [compensation] for the measure of what he lost. Therefore, if he lost the entirety [of the property], [compensation in the amount of] its value is obligatory. If he lost part of it, its estimated value is obligatory, as in cases other than animals [the context in question]. The usurper is not liable for lost profits because of withholding commercial property from its owner for a certain period in which it was possible he could have reaped a profit from it, because this [profit] does not exist. *Kashshaf*, 4:89.

18. Prof. Hallaq seeks to overcome all these difficulties in the way of claiming profits in this case by reference to

rules about when a usurper mixes fungible usurped property with his own property so that the two can no longer be separated. Ordinarily, the usurper is bound as before to restore an equivalent sum from the commingled property, but sometimes the situation requires the owner and the usurper to be considered proportionate undivided co-owners of specific commingled property. But this is discussed only by way of identifying the best way to restore to the owner his usurped property, and is hardly the equivalent of overcoming fundamental principles requiring all claimed profits to be concretely traceable, fully actual, and entirely known.

19. Building further on an already tenuous chain of reasoning, Prof. Hallaq argues that the defendant in this case is entitled not only to its share of the sums by which the joint ventures were allegedly overcharged; it is also entitled to be considered, to the extent of the usurped sums, a proportionate partner in SABIC itself, on the assumption that the usurped money has actually been commingled with the capital of SABIC. And further, he argues that the defendant is entitled, as a partner in the plaintiff, to its proportionate share of all the profits reaped by SABIC over the 20-plus years during which the overcharges have allegedly occurred. By this point we have utterly departed from any shred of realism in predicting the judgment of a Saudi court. Speculation much less far-fetched than this is routinely rejected in Saudi courts. The defendant's theory is worlds away from the guarded willingness of al-Buhuti to trace the actual, fully determined profits of concrete actual property. This is instead piling speculation upon speculation. A Saudi judge would respond here that he has no way of knowing whether the capital theoretically absorbed into SABIC could be traced in any way to real profits. Such a response, however foreign to many Western notions of damages, is, again, entirely commonplace in Saudi courts.

* * *

The above is a summary of doctrines of Islamic and Saudi law that, on my present knowledge of the facts and claims in this case, appear highly relevant. If other issues of Saudi law should arise or a closer focus on certain facts or further explanation of Saudi law should be needed, as discovery continues or if the parties explore additional issues, then I would be glad to expand on the discussion offered above.

/s/ Frank E. Vogel
Frank E. Vogel

Sworn to before me this
22nd day of October, 2002

[Attachment omitted.]

APPENDIX P

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION,	)	
Plaintiff,	)	
v.	)	C.A. No. 00C-07-161-JRJ
MOBIL YANBU PETRO-CHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	

REPORT OF THE INDEPENDENT EXPERT
HERBERT S. WOLFSON

1. I am, and have been since 1990, a practicing lawyer. My current *curriculum vitae* is attached to this Report as Appendix 1. As noted therein, I received a Master of Arts degree in the Department of Oriental Studies at the University of Pennsylvania in 1991 where I studied under the late Prof. George S. Makdisi, a world-renowned expert on Islamic legal history and especially the rise of the Hanbali guild of law. My studies with Prof. Makdisi focused primarily on the field of *usul al-fiqh*, which deals with the sources and theoretical underpinnings of the Islamic legal system.

2. I studied Arabic at the University of Pennsylvania from 1981 through 1988. My instructors included Prof. Makdisi, Prof. Roger M.A. Allen and Prof. Adel Allouche, among others. In addition, I twice received a fellowship, awarded

on the basis of a competitive examination of Arabic students nationwide, that enabled me to attend the American University in Cairo, Egypt, where I received intensive instruction in both written Arabic and the variety of Arabic spoken in Cairo. Because of the excellent Arabic language training I received at Penn, I am now comfortable reading and conducting research in Arabic-language source materials, including both medieval treatises on Islamic law and modern sources. In addition, my training allows me to converse in Arabic about legal topics with lawyers, judges and regulatory officials from Egypt, Saudi Arabia, the United Arab Emirates, Qatar, Kuwait and elsewhere in the Arabic-speaking world.

3. During the period from early 1991 through December 1998, I lived and practiced law in the Middle East. I spent slightly over one year of that time practicing with an American law firm in Riyadh, Saudi Arabia; I spent the remainder in the United Arab Emirates with a different firm. While in Saudi Arabia, I advised multinational clients on numerous issues relating to the laws and practices of Saudi Arabia, conducted case law research on decisions of the Board of Grievances and Islamic law issues, and met officials of the Board of Grievances. Although there are certainly differences between Saudi Arabia and the United Arab Emirates, the legal systems of each country are based on Islamic law[1] with emphasis on the Hanbali guild[2] (although the U.A.E. has adopted a system of codified law, and makes the Maliki guild equal in status to the Hanbali guild in matters of judicial interpretation). While residing in the United Arab Emirates, I continued to stay abreast of developments in Saudi Arabia through a subscription to Umm Al Qura (the "official gazette" of Saudi Arabia), by reading publications of interest such as Middle East Executive Reports, and

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[1] See Article 7, Constitution of the State of the Untied Arab Emirates, 1971 as amended.

[2] Article 1 of U.A.E. Federal Law No. 5 of 1985, as amended (the "U.A.E. Civil Code").

through frequent conversations with fellow practitioners, among other things. I have published a number of articles on legal developments in Saudi Arabia and the United Arab Emirates.

4. Upon returning to the United States in December 1998, I set up my own law practice advising clients on the laws and practices of the Arabic-speaking Middle East. In the recent past, I advised clients on a number of franchising transactions in Saudi Arabia, Bahrain and the United Arab Emirates, among other things. I researched Egyptian law and worked with Egyptian co-counsel to prepare an expert witness affidavit on Egyptian law in a civil forfeiture action in the United States. I continue to maintain an academic interest in Islamic law, which is relevant to the United Arab Emirates, Egypt and other Arabic-speaking countries as well as Saudi Arabia. My personal library contains copies of key commercial laws from Saudi Arabia in addition to numerous Arabic-language treatises on both *fiqh* and *usul al fiqh*.

Purpose and Scope of Report

5. I am providing this report at the request of the Court, which appointed me as an independent, neutral expect pursuant to an order dated 30 January 2003 (the "Order"). I have been asked to research and offer opinions on the following issues:[3]

A. In interpreting contract terms or provisions under Saudi Arabian law, what rules apply? For example, if a contract provision is thought to be ambiguous or unambiguous, what will the courts rely on to determine the true meaning intended by the parties?

(i) Do the Saudi Arabian courts ever rely on evidence outside the plain (or apparent) mean-

[3] This report reverses the order of the second and third questions; the Independent Expert believes the sequence adopted herein facilitates the logical flow and readability of the report.

ing of the words of the contract? If so, under what circumstances does that happen?

(ii) What else (if anything) do the Saudi Arabian courts rely on, or what principles do they apply (e.g., public policy considerations, course of conduct)?

B. Under Saudi Arabian law, what are the elements of the tort of *ghasb*?

C. If ExxonMobil is successful in demonstrating liability, is ExxonMobil entitled under Saudi Arabian law to recover for SABIC's use of ExxonMobil's property, in addition to the return of ExxonMobil's property?

Summary of Conclusions

Contract Interpretation

6. Saudi Arabian courts are not bound by particular rules of contract construction, but tend to apply certain Islamic law maxims, discussed in more detail *infra*. Saudi Arabian courts normally give the parties broad latitude to introduce any evidence that such parties deem relevant to the case, including matters extrinsic to the "plain meaning" of a contract. A Saudi Arabian court is likely to rely on evidence of such extrinsic matters in circumstances where the court (a) deems the words of the contract to be ambiguous, (b) believes such evidence is relevant to the essence of the dispute between the parties, or (c) believes that considerations of public policy (including principles of the Islamic *shari'a*), the interests of justice or the court's perception of the equities require it to do so.

7. A Saudi Arabian court is likely to take public policy (including principles of the Islamic *shari'a*), course of dealing, commercial custom and its perception of the equities into consideration in formulating its decision in a particular case.

8. A definition of *ghasb* that incorporates its essential elements is: (a) the exercise of ownership or possessory

rights (*istila'*) (b) over the property of another (*`ala mal ghayrihi*); (c) without consent (*qahran*); (d) openly and notoriously (*jahran*); and (e) wrongfully (*bighayr haqq*).

9. A Saudi Arabian court will not order the payment of pre-judgment interest (or any other form of interest characterized as such), because the payment or receipt of interest is seen to contravene the Islamic law prohibition against *riba* (usury). The prohibition against *riba* is considered a matter of fundamental public policy in Saudi Arabia. A Saudi Arabian court will not order compensation in respect of lost profits or other rubrics of damages deemed to be "speculative." However, it is my tentative conclusion that if ExxonMobil proves that SABIC wrongfully took possession of property belonging to ExxonMobil, and that such taking constitutes *ghasb*, then there is support for the proposition that ExxonMobil would be entitled to recover compensation in respect of SABIC's *actual profits* attributable to its wrongful use of the ExxonMobil's property. Additional research is required to investigate whether this remedy is currently applied in Saudi Arabia and/or whether Saudi judges, including judges serving on the Board of Grievances, would view it favorably.

Background—The Saudi Arabian Legal System

10. The legal system of the Kingdom of Saudi Arabia is neither a common law system based on case law, nor is it a code-based civil law system like that of many other Arab countries. Saudi Arabia is a unique hybrid system. The Kingdom's "constitution" makes Islamic law (*shari'a*) the law of the land. Many Saudi lawyers insist that *shari'a* principles—articulated in treatises some of which date from the 12th century—continue to serve as the most important reference works on legal questions in Saudi Arabia. However, Saudi Arabia also has a system of statutory law,[4] and the

[4] Saudi Arabia uses the Arabic word *nizam* (literally "regulation") to describe its legislation instead of the Arabic word *qanun* ("law") that is commonly used in the rest of the Arabic-speaking world.

Kingdom has established specialized courts with jurisdiction over commercial and administrative cases, among other things. Decisions of these specialized courts, which include the Board of Grievances and the Commercial Paper Committee,[5] seem strikingly similar in style to rulings of courts in Arabic-speaking code jurisdictions like Abu Dhabi or Cairo; citations by the specialized courts to medieval texts are noteworthy by their absence, and judges in these courts greatly respect the writings of modern Egyptian legal scholars such as Abdul Razzaq Sanhuri.[6] However, decisions of Saudi courts are not made publicly available on any regular basis, although occasional collections of judgments have been published, and there is no system of *stare decisis*; even the extent to which lower courts are obliged to follow the rulings of appellate courts is the subject of some uncertainty.

11. The specialized courts form part of a system of statutory law[7] that co-exists in a complex relationship with traditional legal institutions, including elements of the Islamic *shari'a* and the *shari'a* courts. The *shari'a* courts do apply Islamic law, and rely heavily on the medieval treatises in doing so. A series of Saudi statutes purporting to regulate the *shari'a* courts[8] affirm their independence from the King and other executive authority; the *shari 'a* courts tend to vigorously assert such independence and occasionally assert jurisdiction over cases that statutory law purports to place within the purview of the specialized tribunals.

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[5] A specialized tribunal created pursuant to the Commercial Papers Regulation, Royal Decree No. 37 of 11 Shawwal 1383.

[6] Abdul Razzaq Sanhuri (1895-1971).

[7] Prof. Vogel refers to this as "King's Law" in his monograph *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000) (hereafter "*Legal System*").

[8] *Nizam Al-Qada* ("Judiciary Regulation"), Royal Decree No. M/64 of 14 Sha'aban 1395; *Nizam Tarkiz Mas'uliyyat Al-Qada' Al-Shar'i* (Regulation for Establishing the Responsibilities of the Shari'a Judiciary), Royal Decree No. 109 of 24 Muharram 1372; and *Nizam Al-Murafa'at Al-Shar'iyya* (Rules of Shari'a Procedure), Royal Decree No. M/21 of 20 Jurnada I 1421.

12. Many people—including Saudis themselves—use the terms "Islamic law" and "Saudi law" interchangeably. There are number of reasons, including political reasons, why some Saudis do so. However, the terms "Islamic law" and "Saudi law" are neither coextensive nor interchangeable, and blurring the distinction between the two may lead to confusion.

13. Islamic law includes a broad system within which there is considerable variation, not only among the four existing Sunni guilds (discussed below), but between the Sunni guilds and Shi'i Islam, which is prevalent in Iran, Yemen and elsewhere. Legal theory and practice in Saudi Arabia tends to emphasize the Hanbali legal guild, and thus the methodologies and principles of the other Sunni guilds, and of Shi'ism, are de-emphasized. Thus, everything that may be called "Islamic law" is not necessarily incorporated into the Saudi Arabian system. At the same time, there is no doubt that the Saudi Arabian system includes the statutory and regulatory elements that Prof. Vogel calls "King's Law," even if there is a certain degree of tension between these elements and the traditional system. While the Saudi Arabian government endeavors to ensure that this corpus of law conforms to the norms of Islamic law, positive law, by definition, is not law derived from revealed text through a case-by-case method of *ijtihad* (see below). Consequently, all things that are part of "Saudi law" are not necessarily included within the term "Islamic law."

Islamic Law

14. Islamic law is a divinely inspired legal system that regulates all aspects of human behavior. Principles of Islamic law cover an individual's relationship with God[9]

[9] The Arabic word for "God" is "Allah." Arabic-speaking Christians and Muslims all use this word to refer to the Supreme Being. Failing to translate the term into English is confusing, inaccurate and unnecessarily divisive during these troubled times (particularly because Muslim scriptures affirm that Muslims, Christians and Jews all worship the same Supreme Being, albeit in different ways).

(*'ibadat*) as well commercial transactions (*mu'amalat*). Muslims consider Islamic law to be the revealed will of God.[10]

15. In the centuries after the life of the Prophet, scholars began to articulate comprehensive theories of Islamic law, including the science of *usul al-fiqh* (discussed below) and the science of jurisprudence (*fiqh*). The Sunni scholars eventually coalesced into a number of guilds,[11] four of which survive in modern times. The surviving legal guilds are the Hanbali, Hanafi, Shafi'i and Maliki. It is important to recognize that, consistent with Islam's emphasis on proper analysis through *ijtihad*, the four guilds are regarded as equally orthodox; there is neither any definite organization, nor a strict uniformity of doctrine within each guild.[12]

16. Some of the legal rules in the Islamic system are stated expressly in the Qur'an.[13] For matters not specifically covered in the Qu'ran, legal rules must be derived by legal scholars from the Qur'an and other authoritative sources using agreed upon sources and methods. The science of *usul al-fiqh* studies the sources and methods for deriving legal rules. The principal sources for deriving such rules are (a) textual sources, which consist of the Qur'an and the *sunna* (the tradition of the Prophet and his Companions, as recounted in narratives called *hadith*), and (b) methodological sources, including *qiyas* (reasoning by analogy), (d) *ijtihad* (derivation of legal rules through study, research and independent analysis) and (e) *ijma'* (a formal system for investing unanimous decisions of the Islamic community's legal scholars with the status of legal authority, based on the principle of the community's collective infallibility). Certain

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[10] N.J. Coulson, *A History of Islamic Law* (Edinburgh: Oxford University Press, 1978), 1.

[11] Arabic *madhahib*, singular: *madhhab*.

[12] See George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, (Edinburgh: Edinburgh University Press, 1981), at 1.

[13] (sometimes spelled Koran in English)

guilds recognize other tools for deriving legal rules, but these will not be discussed in this report.

17. It is important to note that the Islamic system, as expressed through the science of *usul al-fiqh*, does not include a legislative element, although scholars in Islam acquiesced in the enactment of temporal legislation by sultans and other political rulers.[14] The *shari'a* is considered to be both timeless and comprehensive. Rules of Islamic law are not enacted through temporal legislation, nor through decisions by popes, councils or synods (none of which exist in Islam). Instead, they are derived by qualified legal scholars through study and analysis (essentially, the process of *ijtihad*). According to the principles of *usul al fiqh*, such study and analysis must be conducted, from scratch, each time a question requiring a legal ruling is presented. The Islamic system acknowledges that this approach may lead to different scholars reaching different results at different times, even on similar questions. Such different results are viewed as acceptable so long as the proper analytical procedures are followed in reaching the results. This emphasis on the procedure for deriving rules, rather than the substantive content of rules so derived, and the absence of central authority or other mechanism for achieving uniformity of doctrine,[15] have led some to observe that in Islam—or at least the classical tradition in Islam—is characterized not by orthodoxy, but by orthopraxis.

18. During what is termed the "classical period" of Islamic thought—a period that roughly corresponds with what Europe called the Middle Ages or the medieval period, there was a tremendous flowering of scholarly activity in the Islamic world. Many great treatises on Islamic law—the so-called "books of *fiqh*"—were composed during this period.

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[14] See, for example, Mawardi's *Al-Ahkam Al-Sultaniyya* (Cairo: Al Halabi & Sons, 1973).

[15] The only such method is the institution of *ijma*, (consensus) but the rules governing the formation of such consensus are sufficiently complex as to leave considerable room for scholarly dissent.

These scholarly treatises collect the teachings of the author's guild, including majority viewpoints and minority viewpoints, and frequently identify prominent majority and minority viewpoints within other guilds as well. Accordingly, scholarly treatises from the classical period tend to provide the reader with a spectrum of possibilities on any given question, rather than a single "correct" answer.

19. The *fiqh* treatises were written by legal scholars who received formal training in the science of law at colleges of law (*madrasas*). Qualified scholars were called *muftis*. A *mufti* held a license to issue legal opinions (*fatwas*) and to teach law.[16] During the classical period the office of *mufti* had no official sanction, and a *mufti* would normally be employed by a college or similar institution established as a charitable endowment (*waqf*). Charitable endowments were independent of the political institutions of the state and, although some endowments were funded by rulers and princes, others were funded by private individuals. During this period, the *mufti* therefore enjoyed academic freedom.[17] The state began to assume control over the office of *mufti* in the late medieval period and, by the Ottoman era, the office of *mufti* was an official post paid for, and under the control of, the state. Most Muslim countries, including Saudi Arabia, now have a Grand Mufti or some similarly titled official post. Coincidentally (or perhaps not), the assumption of state control over the office of *mufti* coincided with a gradual decline in the diversity of scholarly output, as *muftis* increasingly were given the task of reviewing and/or legitimizing rules of positive law intended for general and consistent application within a particular country or region.

20. While a *mufti's* role was to issue non-binding legal opinions and to teach law, the judge's role was to issue binding rulings in actual cases between real litigants. Perhaps

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[16] Makdisi, at 270ff.

[17] Though not necessarily personal freedom; many of the prominent *muftis* spent periods of time imprisoned by the ruler.

because the role is necessary for the proper administration and smooth functioning of any complex society, persons holding the office of judge (q*adi*) have always been employees of the government. Among *muftis*, there was a long tradition of refusing judgeships and the obligations to political rulers entailed by such official posts.

21. In light of the foregoing, there is an important dichotomy between the *mufti* and the judge. The former is an independent academic, whose writings represent theory and teaching, and the latter is an employee of the government whose rulings reflect actual practice.

22. There is ongoing debate among scholars of the medieval period as to whether the *fiqh* books should be understood as descriptive of actual practice. The traditional view is summarized by N.J. Coulson, who states the "function of Muslim jurisprudence has always been ... to tell the courts what they ought to do, rather than attempt to prophesy what they will in fact do."[18] Although recent Western scholarship has begun empirical evaluations to test the validity of the traditional view,[19] contemporary Saudi thinkers do make such a distinction. For example, Abdulaziz Al al-Shaykh notes that the purpose of the judiciary is to "decide controversies according to legislative principles and the prevailing regulations ... in a manner that compels compliance and is capable of being enforced by the rulers and the competent authorities."[20] Al al-Shaykh concludes that the judiciary's characteristics "of compulsion and enforcement are the decisive criteria that distinguish it from *ifta'*.[21] Because *ifta'* (the issuing of legal opinions by muftis) is inherently not binding, it is essential to bear in mind the potential dichotomy be-

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[18] Coulson at 3.

[19] See, for example, Fadel, "Adjudication in the Maliki Madhhab." Unpublished Dissertation (University of Chicago: 1995) at 293 et seq.

[20] Al al-Shaykh, *Lamahat Hawla al-Qada' fi al-Mamlaka al-Arabiyya al-Sa'udiyya* (Riyadh: Dar al-Shibl, 1990) at 16.

[21] Id.

tween theory and practice when trying to ascertain how a Saudi Arabian court, applying principles stated in scholarly works dating from centuries ago, is likely to rule on a given fact pattern in the year 2003.

23. Indeed, efforts to look towards past practice as a guide to possible future outcomes may well be inherently at odds with Islamic law's doctrinal insistence on the use of *ijtihad* to derive the appropriate legal rule governing each individual case. Islamic legal theory is doctrinally hostile to what it terms *taqlid*. *Taqlid* is a complex concept that encompasses, among other things, the unquestioning adoption of the prior legal reasoning of another. In part because of Islamic legal philosophy's rejection of *taqlid*, Islamic law resists the common-law concepts of binding precedent and *stare decisis*, and this doctrinal hostility to binding precedent has been incorporated into the Saudi Arabian legal system.

Certain Differences between Saudi Arabian Law and Islamic Law

24. Saudi Arabia has instructed judges to rule in accordance with the teachings of the Hanbali guild of Islamic law.[22] Such an instruction—if applied in practice—would have the effect of constraining Saudi Arabian law to a limited subset of Islamic law because, as noted above, Islamic law recognizes the teachings of all of the existing legal guilds as equally orthodox. However, despite the instruction to apply Hanbali teachings, Saudi judges can and sometimes do look to the teachings of other guilds.

25. At the same time, Saudi Arabian law includes rules and regulations that are outside the world view and theoretical framework of the medieval *fiqh* scholars (although the Saudi Arabian government makes substantial efforts to ensure that such rules and regulations are not inconsistent with Islamic law).

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[22] Judicial Council, Decision No. 3, cited in *Legal System* at 94.

26. In addition, the Saudi Arabian government (like any government, anywhere) has an institutional interest in the stability of transactions and the predictability of its legal framework. Consequently, the Saudi Arabian government has made repeated efforts to reconcile its institutional interests with the Islamic law framework that is essential to its political legitimacy. Among other steps, Saudi Arabia has (a) introduced specialized courts (like the Board of Grievances) with jurisdiction over cases involving government contracts and large commercial contracts, (b) introduced an appellate court system aimed at harmonizing inconsistent legal rulings through the review of lower-court judgments, (c) attempted to limit Saudi judges to the teachings of the Hanbali guild of jurisprudence, (d) attempted to restrict the range of scholarly works that Saudi judges are permitted to consult as authoritative references and (e) enacted regulations governing, among other things, the rules of civil procedure. In all these steps and others, the government has met with resistance from the traditional judiciary, and the Saudi government's approach to implementation has been less vigorous in some areas than in others.

Methodology

27. In researching the questions addressed in this report, I reviewed (a) several *fiqh* treatises composed by scholars affiliated with the Hanbali, Hanafi, Shafi'i, Maliki and Dhaheri[23] legal guilds, (b) the text of certain Saudi Arabian regulations and cases from the Board of Grievances and other specialized tribunals, (c) certain monographs about the Saudi Arabian legal system, the Saudi Arabian court system, *ghasb* under Islamic law and liability under Islamic law and (d) various items provided to me by the parties. Appendix 2 to this report lists the materials reviewed in connection with the preparation of this report.

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[23] The Dhaheri guild is now defunct but the teachings of its most prominent scholar, Ibn Hazm, continue to be respected throughout the Islamic world.

28. Because the scholarly treatises (and, indeed, certain contemporary Saudi legislative enactments) can be viewed as reflecting theory rather than practice, I deemed it prudent to take soundings from a seasoned litigator. Accordingly, between 4 February 2003 and the date of this report, I conducted a series of telephone conversations with Mr. Mohamed Al Sharif, a prominent Saudi Arabian lawyer who has more than twenty years of experience in the Saudi Arabian courts. During these conversations, I asked Mr. Al Sharif to (a) comment on my views concerning the Islamic law sources and their interpretation, (b) confirm my understanding of certain matters related to trial procedure and evidentiary procedure within the Board of Grievances and the Shari'a courts and (c) address certain hypothetical examples relevant to the questions presented (in general terms and without exceeding the limits of the Protective Order). I did *not* relate the specific facts alleged by the parties to Mr. Al Sharif.

29. This report was prepared under considerable time pressure, in part because the time allotted for research and preparation of the report coincided with a major Saudi Arabian holiday. Judgments of the Saudi Arabian courts are not routinely collected and indexed[24] and, indeed, are not normally publicly available. Because court judgments are not distributed as a matter of routine, obtaining copies generally involves informal approaches to the Board of Grievances, the Ministry of Justice or other institutions. Such approaches take time and perseverance, as social and cultural norms must be followed. Government offices in Saudi Arabia closed for about two weeks, for the Hajj and Eid al-Adha, during the time allotted for preparing this report. This period of closure in Saudi Arabia made it impossible, as a practical matter, to conduct significant case law research. Having said this, court judgments in Saudi Arabia do not consti-

[24] Key exceptions are a collection of Board of Grievances judgments dating from 1980, and a collection of judgments from the Committee for the Settlement of Commercial Papers Disputes.

tute binding precedent and so the presence or absence of relevant cases is not necessarily dispositive. However, court judgments can (a) demonstrate that a particular point of view has found favor with at least one Saudi judge and/or (b) reflect a current trend within the Saudi judiciary on a particular issue (particularly if there are multiple consistent rulings over a period of time). The recent end of the Saudi holidays should facilitate the conduct of additional research.

Discussion and Analysis

Contract Interpretation

30. Saudi Arabian courts are not bound by particular rules of contract construction. Neither the Board of Grievances Regulation,[25] the Judiciary Regulation, the Rules of Procedure before the Board of Grievances[26] nor the Rules of Shari'a Procedure specify rules or precepts that judges must use in construing contracts.

Maxims of Interpretation

31. In construing contracts, Saudi Arabian judges rely on a number of guidelines including certain Islamic law maxims. These maxims include *"al-Muslimun `ala shurutihim"* (Muslims are bound by their contractual obligations) and *"al-'aqd shari 'at al-muta'aqidin "* (the contract has the status of law, as between the parties). Both of these maxims correspond to the common law maxim *pacta sunt servanda.*

32. Also relevant for the purpose of contract interpretation are two oft-cited maxims. These are (a) *al-ibra fi al-'uqud bi al-irada al-dhahira, la bi al-irada al-batina* (the salient matter in contracts is the outward meaning, not the inner intent) and (b) *al-ibra fi al-'uqud lil-maqasid wa l-ma' ani, wa laysa bil-alfaz wa l-mabani* (the salient points of a contract are intent and meaning, not words or formulations).

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[25] Royal Decree No. 2/13/8759 dated 17 Ramadan 1373, as amended.

[26] *Qawa'id al-Murafa'at wa 1-Ijra'at Amama Diwan al-Mazalim* ("BOG Procedure Rules").

Although these two maxims superficially appear to be contradictory, Sanhuri, the famous twentieth-century Egyptian legal scholar, asserts they are reconcilable.

33. According to Sanhuri, the first maxim points out that "inner intent" is a psychological phenomenon affecting the contracting party and, as such, does not concern society and is irrelevant to legal analysis. "Outward meaning," on the other hand, is a social phenomenon which does concern society, and is the basis on which contracts are formed.[27]

34. In contrast, the second maxim emphasizes the intent of the parties over the specific words and legal formulas recited by the parties. A variant of this maxim appears in the *Majallat al-Ahkam al-Shar'iyya* of the twentieth-century Saudi scholar Ahmad Al-Qari.[28]

35. Sanhuri argues that the two maxims cited in paragraph 32 are not contradictory. Although it is correct to consider intent and meaning, not mere words and formulations, the intent that must be considered is outward intent—that which can be derived from the phrases and the forms in which they are used, as well as objective evidence and tangible indicia; this is an objective inquiry that does not entail a personal evaluation of the psyche aimed at uncovering the secrets of the soul [29]

36. Another maxim frequently cited by scholarly *fiqh* treatises and contemporary Saudi lawyers[30] is *al-ma'ruf 'urfan ka l-mashrut shar'an* (a well known custom is tantamount to an implied term of the contract).

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[27] Sanhuri, 6 *Masadir al-Haqq fi al-Fiqh al-Islami* at 30 (Cairo: Dar al-Fikr, no date) (hereafter *Masadir*).

[28] *Al Qari, Majallat al-Ahkam al-Shar'iyya*, § 10 (Jeddah: Tihama Press, 1981) (hereafter *Majalla*); see also the footnote to that section.

[29] Sanhuri, 6 *Masadir* at 34.

[30] See, for example, Ashaush, Ahmad *Al-'Uqud Al Madaniyya* at 31 (Jeddah: Dar Tharwat, 1992).

Practical Aspects of Procedure Before the Saudi Courts

37. In practice, a Saudi judge (whether in a Shari'a court or on the Board of Grievances) is likely to look behind the words of a contract to ascertain the true intent of the parties if he deems the words to be ambiguous. This begs the question of how a Saudi judge will determine the words to be ambiguous. Unfortunately, there can be no clear guidance on this question, because what one party asserts is clear and unambiguous may not appear so to the other party or the judge. A Saudi judge, in particular, may well conclude that the mere existence of a dispute between the parties over the meaning of a contract provision indicates that such provision, by definition, must not be unambiguous.

38. Saudi Arabian procedural rules make Arabic the official language of the courts. All testimony must be in Arabic and all non-Arabic documents submitted to the court must be accompanied by a certified Arabic translation.[31] Translation is an art, not a science, and phrases in complex commercial agreements that appear unambiguous in the original English may well seem less clear in translation.

Trial Practice Before the Board of Grievances

39. The Board of Grievances, like civil courts in other Arab countries, relies heavily on written pleadings. Unlike American courts, in which a trial normally starts and finishes within a discrete block of time (excluding pre-trial motions and conferences), a case before the Board of Grievances will normally involve a series of non-contiguous hearings at which parties exchange pleadings and other documents. The hearings are sometimes quite brief and may be separated by days, weeks or even longer.

40. At such hearings, the parties are free to present documentary evidence (oral testimony requires the court's permission).[32] The parties generally have broad freedom to

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[31] See BOG Procedures Rule13; see also Judiciary Regulation, Article 36.

[32] BOG Procedure Rules, Rule 23.

submit any written statement or documentary evidence that they deem relevant to the case. A party can object to evidence submitted by its opponent on a variety of grounds, including among others, authenticity or relevance. However, such objection is normally made in a written brief responding to the evidence, not contemporaneously with the submission. Moreover, there is no basis for excluding evidence pursuant to such an objection. After the parties have rested their cases, and the case file is complete, the Board of Grievances will render its decision on the merits. The Board of Grievances may (or may not) articulate specific items of evidence it has considered, and other items of evidence that it has disregarded, and the relative weight to be afforded thereto. The result of such determination is normally briefly stated, if at all, in conclusory fashion in the written ruling issued by the Board of Grievances.

Shari'a Courts

41. While proceedings before the Board of Grievances rely mainly on the exchange of written pleadings, shari'a court proceedings are primarily oral. However, shari'a court rules permit written testimony and defenses may be presented in the form of written memoranda.[33] Not only do shari'a courts tend to view oral testimony as more reliable than documentary evidence,[34] but a shari'a court is likely to attempt to ascertain the essence of a dispute through interrogation of the parties. A shari'a court may well attempt to induce the parties to reach a settlement, by attempting mediation or conciliation, as an amicable settlement is viewed as preferable to a formal ruling.

42. Within the context of a shari'a court proceeding, the litigants and their witnesses are free to testify to matters extrinsic to the "plain meaning" of a contract. Indeed, the

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[33] Rules of Shari'a Procedure, Article 61.

[34] Indeed, the section on writings in the Rules of Shari'a Procedure deals almost exclusively with questions of authentication, and does not address substantive interpretation.

court is likely to encourage them to do so, although testimony must be relevant to the issues in the case.

43. Any Saudi Arabian tribunal is likely to take public policy, course of dealing, commercial custom and its perception of the equities into consideration in formulating its decision in a particular case. Principles of Islamic law are deemed to be matters of public policy in Saudi Arabia.

Companies Regulation

44. Based on my review of the pleadings and other documents provided to me, it appears that one of the topics at issue in the instant case is whether certain license agreements between YANPET and SABIC, and between KEMYA and SABIC, (or course of conduct amongst the parties) may be interpreted as implicit amendments of the joint venture agreements between SABIC and YANBU, and SABIC and ECAI respectively. Prior expert testimony has framed this issue in terms of *ja'iz* and *lazim* contracts under Islamic law.

45. The Order has not asked me to opine on this particular issue. Accordingly, I have not conducted any research on it, nor do I intend to offer conclusions on the topic. Nevertheless, it is worth pointing out that both YANPET and KEMYA are limited liability companies. Islamic law recognizes neither the concept of limited liability nor the concept that companies may have independent legal personality. As such, YANPET and KEMYA cannot be considered traditional Islamic law partnerships. Instead, YANPET and KEMYA, like all other limited liability companies in Saudi Arabia, are creatures of statute. The relevant statute is the Companies Regulation,[35] which governs most corporate entities established in the Kingdom.

46. The Companies Regulation requires a limited liability company to comply with certain procedural formalities. Specifically, the articles of association (*'aqd ta'sis al-*

[35] Royal Decree No. M/6 dated 22 Rabi'a I 1385, as amended.

sharika), and all amendments thereto, must be executed before a Notary Public and filed with the Ministry of Commerce. In addition, public notice of the contents of the articles of association is required.[36] These rules appear to provide a basis for ExxonMobil to argue against SABIC's assertion that the joint venture agreements may have been implicitly modified by a subsequent agreement, course of conduct or otherwise. Moreover, Article 10 of the Companies Law arguably creates a cause of action on behalf of the company, against its managers and the members of its board of directors, for damages suffered by the company caused by non-compliance with such formalities.

47. Having said this, there are three reasons why an argument based on Articles 10 and 11 of the Companies Regulation, might not be dispositive.

48. First, an argument against implied amendment grounded in the Companies Regulation might be undermined if the KEMYA and YANPET joint venture agreements themselves did not comply with the formal requirements of Article 10 and Article 11 of the Companies Regulation. I have not been provided with any information that would allow me to determine whether the joint venture agreements complied with such requirements. However, joint venture agreements tend be viewed, in Saudi Arabian commercial practice, as private agreements between the partners, analogous to shareholders agreements. Such agreements typically supplement, but do not normally form part of, the official constitutive documents of the company that are filed with the authorities. Normally, the parties file only the articles of association (*'aqd ta'sis al-sharika*). The articles of association would normally comply with the formal requirements of the Companies Regulation (*i.e*, signature before the Notary Public, submission to the Ministry of Commerce and publication in Umm Al Qura). It may not be

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[36] Companies Regulation, Articles 10 and 11 . See also Article 164, which requires public notice of all amendments to limited liability company articles of association.

helpful for ExxonMobil to place undue reliance on the Companies Regulation rules on procedural formalities if the joint venture agreements themselves have not satisfied such procedural formalities in the first place.

49. Second, even if Article 10 and Article 11 were deemed to apply, the failure to comply with execution formalities would limit the partners' right to assert the amendment against third parties. However, Articles 10 or 11 would not necessarily preclude the partners from asserting the amendment as between themselves.

50. Third, and finally, one cannot rule out the possibility that if a case involving such a claim were brought before a shari'a court in Saudi Arabia, that court might decline to give effect to the statutory law, and rule instead on the basis of Islamic law principles.[37] While this possibility should not be entirely discounted, it seems more likely that a case involving Companies Regulation issues would be heard by the Board of Grievances. A limited liability company in Saudi Arabia is a creature of statute under Saudi Arabian law. Islamic law does not recognize the concept of independent juristic persons and it is uncomfortable with the concept of limited liability. Nevertheless, the Board of Grievances recognizes the right of limited liability companies to sue and be sued. It is not an unreasonable stretch to infer that the Board of Grievances would expect a limited liability company to comply with the formal requirements of the statute pursuant to which it is created.

51. Nevertheless, even if Articles 10 and 11 of the Companies Regulation are not dispositive of this issue, such provisions are relevant and should be taken into consideration.

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[37] Prof. Vogel alludes to this possibility in his expert testimony and in Legal System. Note that the principles of Islamic law, as articulated in the *fiqh* treatises, do not require a partnership agreement to be in writing and thus, a *fortiori*, do not require any execution formalities.

Ghasb

52. *Ghasb* is a concept that derives from Islamic law. Prof. Vogel and Prof. Hallaq have expressed different views on the definition and the relevance of this Islamic law concept. Both experts offer differing views on the legal implications for the parties should the Court conclude that the facts proven meet the definition of the tort[38] of *ghasb*. This is understandable, because the decentralized nature of the Islamic legal system, and its emphasis on independent reasoning, means there is no single, binding definition of *ghasb*, but rather a range of possibilities.

53. Based upon my research, I have concluded that Islamic law authors from the classical period offer differing definitions of *ghasb*. Paragraphs 54-55 address Prof. Hallaq's assertions as to the breadth of the doctrine of *ghasb*. Paragraphs 56-69 address the elements of *ghasb* beginning with those identified by Prof. Vogel. Paragraphs 70-71 set forth two twentieth-century characterizations of *ghasb* and paragraph 72 sets forth my conclusions regarding the essential elements of the doctrine of *ghasb*. This report draws no conclusions as to whether the facts alleged by ExxonMobil, if proven to be true, would constitute *ghasb*.

Description of *Ghasb* in Prior Expert Testimony

Prof. Hallaq's Description

54. Prof. Hallaq asserts that the concept of *ghasb* is broad enough to encompass any wrongful taking of property. This characterization of *ghasb* is clearly inaccurate, at least as a matter of form. The Hanbali scholars take pains to distinguish *ghasb* from other forms of wrongful taking including, among others, *sariqa*, which involves stealing property from a place of safekeeping,[39] *ikhtilas*, which involves guile

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[38] The word "tort" is alien to classical Islamic law terminology; nevertheless, this report uses the word "tort" because it is a convenient form of reference.

[39] *Sariqa* can perhaps be roughly translated as burglary.

or deception (and thus no element of withheld consent), and *nahb* (taking by force, or robbery). Mohammed A. Siraj, a contemporary scholar who interprets *ghasb* broadly, distinguishes *ghasb* from *sariqa* and *hiraba*.[40]

55. Having said this, it is not entirely clear whether the distinction between *ghasb*, on the one hand, and *ikhtilas*, *khiyanat al-amana*, *nahb* and other forms of wrongful taking, on the other hand, makes any substantive difference in terms of the aggrieved party's right to restitution.[41] The treatises devote extensive attention to the tort of *ghasb* and, specifically, the circumstances in which the aggrieved party is entitled to recover (a) the actual usurped property, (b) the value of the usurped property and/or (c) the proceeds of the usurped property. For example, Buhuti devotes 13 pages to *sariqa* and 34 pages to *ghasb*; he devotes about one or two sentences to the question of *ikhtilas*, and those sentences do not address the aggrieved party's compensatory remedies for *ikhtilas* at all.[42]

Elements of Ghasb

56. Prof. Vogel identifies what he asserts to be essential elements of the tort of *ghasb*, and goes on to argue that certain such elements are absent from the facts alleged by ExxonMobil. Specifically, Prof. Vogel argues that in order to constitute *ghasb*, the conduct must (a) include an element of force or forcefulness, (b) be open and notorious and (c) demonstrate an intent to transgress the rights of others.

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[40] Siraj at 205.

[41] Having said this, I recognize that distinguishing *ghasb* from the crimes of *sariqa* and *hiraba* has important substantive effects; see paragraph 63, *infra*.

[42] Compare the late-20th century *Mawsu'a Fiqhiyya*, which devotes 29 pages to *ghasb* and 2 pages to *ikhtilas*. The *ikhtilas* entry discusses criminal penalties, but does not discuss remedies for restitution.

Analysis

Force

57. Prior testimony has asserted that an element of "force" is required to establish *ghasb*. Although later Hanbali sources tend to include the word Arabic word "qahran" in their definitions, the word "qahran" does not mean "forcibly" in the context of the definition of *ghasb*. Six factors lead to this conclusion:

(a) the word "qahran" is absent from definitions provided by earlier Hanbali sources such as *Al Mughni*[43] and from the Hanafi, Shafi'i and Dhaheri sources.

(b) treatises that do refer to "qahr," are devoid of discussion as to what constitutes "force" (despite extended discussion of other concepts related to the definition). The main point of contention in the *fiqh* treatises is not whether "force" is required, but whether the wrongful act of possession (i) needs to be accompanied by a physical act performed on the property in dispute, a view that necessarily limits the applicability of *ghasb* to non-movable property such as real estate and intangible rights (this view is advanced mainly by Hanafi and Maliki scholars) or (ii) does not require an act performed on the property, a view that recognizes *ghasb* of real property and intangible rights (the position advanced by the Hanbali, Shafi'i and Dhaheri guilds, as well as Zaidi and Imami Shi'ite scholars).[44]

(c) the treatises identify numerous examples of conduct that the authors deem to be *ghasb*, but which contain no element of force.

(d) Buhuti, a relatively late Hanbali scholar, uses the word "qahran" in a way that demonstrates at least to Buhuti—the word "qahran" does not mean forcibly.[45]

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[43] See, e.g., Muwaffaq Al Din Ibn Qudama (died 1223) writing in *Mughni* (Cairo: 1996), Vol. 7 page 31.

[44] Siraj, *Daman al-'Adwan* at 200.

[45] See Buhuti, 2 *Sharh* at 395, in two places.

(e) Some authors use the Arabic word *'adwanan* (meaning antagonistically or adversely) in place of *qahran.*

(f) contemporary scholarly analyses of the *fiqh* sources do not posit a requirement for force.[46]

58. In light of the foregoing, a more precise English translation of the Arabic word *"qahran"* in the context of *ghasb* is "without consent." Such translation is supported by the context and the factors identified above, and is also supported by authoritative Arabic dictionaries (including *Taj Al Arous,*[47] and *Lisan Al Arab*[48]*),* and respected Arabic-to-French dictionaries including Biberstein-Kazimirski[49] and Dozy's *Supplément aux Dictionnaires Arabes.*[50]

Open and Notorious

59. Some scholars identify a requirement that the conduct be "open and notorious" (Arabic *jahran* or *mujaharatan*). Although this element appears in Hanafi sources, notably Kasani,[51] it does not normally appear in classical Hanbali sources. Neither Ibn Qudama, Buhuti, nor Shamsuddin Ibn Qudama Al Maqdisi—three of the most influential Hanbali scholars, whose works enjoy tremendous respect in Saudi Arabia—include openness or notoriety as elements in the definition of *ghasb.* Nor do such Hanbali scholars address examples focusing on the openness or notoriety of conduct (or lack thereof) in their discussion of *ghasb.*

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[46] Specifically, Sharara, *Ahkam al-Ghasb*, p. 60 et seq., and *Siraj, Daman al-'Adwan,*

[47] *wa yuqal qaharahu idha akhadhahu qahran min ghayr rida.* 13 *Taj Al Arous* 495.

[48] *wa taqul akhadhtuhum qahran ay, min ghayr ridahum.* 5 *Lisan Al Arab* 3764.

[49] *qahran 'anni* is defined as *malgré moi.* 2 Biberstein-Kazimirski at ___

[50] *qahr* means *déplaisir* and *qahran* can mean *ipso jure.* 2 Dozy 423.

[51] Kasani. 7 *Kitab Bada'i' Al-Sina'i' fi Tartib al-Shara'i'* 143 (hereafter "KBS").

60. However, some contemporary writers do require openness and notoriety.[52] Moreover, Mr. Mohamed Al Sharif, the Saudi Arabian litigator with whom I had extensive discussions about *ghasb*, vigorously argued that *qahr* (lack of consent) and awareness of the wrongful conduct are two sides of the same coin. Mr. Al Sharif maintained that it is meaningless to discuss "consent" without awareness of the conduct from which consent is withheld. Mr. Al Sharif concludes that positing the element of lack of consent necessitates, by negative implication, that the aggrieved party must have knowledge of (a) the property or right that is being taken from him and (b) the method by which his property is taken.

61. Dr. Mohammad A. Siraj, an Egyptian law professor from the modern era, argues that the "open and notorious" aspect of *ghasb* distinguishes it from *sariqa* (burglary) and *hiraba* (robbing and killing connected to the spreading of general fear and helplessness).[53] The former is a crime of stealth, while the latter crime (which some authors have argued corresponds to domestic terrorism)[54] also involves stealth because the spreading of fear and helplessness necessarily entails hiding from government authority.[55]

62. Distinguishing between *sariqa* and *hiraba* on the one hand, and *ghasb* on the other hand, is of vital importance because *sariqa* and *hiraba* are crimes subject to mandatory criminal sanctions (amputation of the hand in the case of *sariqa* and amputation, crucifixion and/or execution in the case of *hiraba*). However, aside from *sariqa* and *hiraba*, it is not clear that there is any substantive distinction between

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[52] See, for example, Shabasi, *Al-Mu'jam al-Iqtisadi al-Islami*, 322 (Beirut: Dar al Jil, 1981).

[53] Siraj, *Daman al-'Adwan* at 205.

[54] Jackson, "Domestic Terrorism in the Islamic Legal Tradition" in 91 *The Muslim World* 293 (Fall, 2001).

[55] Siraj, at 205.

ghasb and other categories of wrongful taking (see paragraph 55 *supra*).

Intent

63. None of the sources I reviewed identify intent to infringe the rights of others as an essential element in the tort of *ghasb*. However, it is worth noting that in Islamic law, *ghasb* is both a "tort" (a violation of the private property right of the person whose property has been taken) and a "crime" (or, more accurately, a sin, in that it violates the rights of God). The element of intent is essential to the "sin" of *ghasb*.

64. Thus, the element of intent is important in the context of determining whether conduct is merely tortious, or whether it is both tortious and sinful. In this context, Sarakshi[56] (a Hanafi scholar) and Ibn Hazm[57] (a Dhaheri scholar) each discuss the question of intent.[58] Both authors state that if the element of intent is present, then the conduct is a sin that requires punishment. If the element of intent is absent, then the conduct is not a sin, and need not be punished. However, whether the conduct is intentional or unintentional, the usurped property must be returned to its original owner.[59]

65. The *fiqh* scholars do not require intent to infringe the rights of others, and some assert that a person may commit the tort of *ghasb* without formulating such intent. For example, one who takes property wrongfully under duress, or who is an innocent purchaser of wrongfully taken property, remains subject to recovery by the true owner under the theory of *ghasb*. In light of this, the intent to infringe cannot possibly be a necessary element of *ghasb*.

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[56] Shams al-A'imma Al Sarakhsi (died 1056).

[57] Abu Muhammad Ali b. Ahmad b. Sa'id Ibn Hazm, (died 1064).

[58] See Sarakhsi, 6 *Kitab Al Mabsut* 49; and Ibn Hazm, 8 *Muhalla* 134-135.

[59] Id.

66. Intent is relevant to Siraj and Sharara (both twentieth-century scholars), but a different kind of intent. Siraj notes that the intent to *exercise ownership* is a necessary element of *ghasb* in the context of real property, because control over real property is a legal construct (as opposed to control over movable property which, as an observable phenomenon, does not require reference to intent).[60] Sharara refers to "adverse intent" (*qasd al-'adwan*), arguing that such intent distinguishes permissive possessors (such as bailees, borrowers and pledgees) from persons whose possession is adverse to the true owner's interest.[61] Despite the emotive term Sharara uses, he is really focusing on the same issue as Siraj—the intent to exercise ownership rights. A bailee, borrower or pledgee takes possession, but normally has no intent to exercise ownership rights in the property. This distinguishes him from a usuper [sic], who by necessity intends to exercise ownership rights, even if he has no intent to infringe the rights of the true owner.

Elements with the Arabic Root H-R-B

67. Al Qari's *Majalla* and certain other Hanbali works provide that to qualify as *ghasb*, the taking must be *ghayr harbi*[62] (non-military), thus excluding the capture of booty during wartime from the definition of *ghasb*. Al Buhuti and others note that property wrongfully taken by a *harbi* (a non-Muslim living outside the jurisdiction of Islamic goverriance)[63] is not subject to the remedies for *ghasb* because the usurper is, by definition, outside the territorial jurisdiction of the *qadi*.[64] Maliki scholars exclude property taken *bi la*

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[60] Siraj, at 203; see also Siraj at 207.

[61] Sharara, at 61 et seq.

[62] Al Qari, § 1375. See also Buhuti, 2 *Sharh* 399 and Transcript of Vogel Deposition, 236.

[63] As opposed to a *dhimmi*, a non-Muslim living as a protected minority under the authority of an Islamic government.

[64] Buhuti, 4 *Kashshaf al-Qina'* at 76; See also Siraj at 237.

hiraba[65] (not through the crime of *hiraba*, for which mandatory criminal punishments apply).[66]

68. The operative words in the elements *harbi, bi la hiraba* and *ghayr harbi* all share a similar Arabic spelling derived from the letters H-R-B. Each of these elements seems to appear singly; *i.e.*, none of the sources I reviewed combine *ghayr harbi* and *bi la hiraba.* Whether there is any link (perhaps transcription errors may have led to variations, causing a legal principle to diverge over the centuries) is a question outside the scope of this report. In any event, I have omitted all the H-R-B phrases from my list of the elements of *ghasb* because (a) there seems to be no majority view as to which meaning, if any, applies and (b) none of the possible meanings seems to have a bearing on the issues in the instant case.

Twentieth Century Characterizations of the Elements of *Ghasb*

69. Two twentieth-century Egyptian legal scholars offer helpful characterizations of the tort of *ghasb.*

70. Sanhuri's characterization follows the typical Hanafi definition of *ghasb*, but lists six elements in a style easily digestible by contemporary readers.[67] Sanhuri defines *ghasb* as: (1) the taking of (2) property, (3) that has a measurable value,[68] (4) in which property rights are protected,[69] (4) without permission from one who has the right to give such permission, (5) in a manner that removes the property from the latter's control (6) by means of an act performed on the property.

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[65] See, for example, Dardir, *Al Sharh Al Saghir* at 416.

[66] See paragraphs 62 and 63, *supra.*

[67] These elements appear at 1 *Masadir al-Haqq* 54.

[68] Not something in which trade is unlawful, for example pork or alcohol for a Muslim.

[69] Not a combatant's property.

71. Siraj provides an equally straightforward definition; unlike Sanhuri's definition, Siraj synthesizes elements from all four guilds. He identifies three key elements: (1) a physical phenomenon described as the "exercise of ownership" (*istila'*), (2) the subject of which is adverse to a property or possessory right; and (3) which adversity distinguishes from the crimes of *sariqa* and *hiraba*.[70]

Elements of the Tort of *Ghasb*: Conclusions of the Independent Expert

72. In light of the analysis set forth in paragraphs 57 through 71, and the materials cited therein, the Independent Expert concludes that the following five elements are essential components of the tort of *ghasb*:

a) The exercise of ownership or possessory rights (*istila'*);

b) Over the property of another (*'ala mal ghayrihi*);

c) Without consent (*qahran*);

d) Openly and-notoriously (*jahran*); and

e) Wrongfully (*bighayr haqq*).

Potential Remedies if Liability is Proven

73. Paragraphs 76 through 90 of this report address whether ExxonMobil is entitled under Saudi Arabian law to recover for SABIC's use of ExxonMobil's property, in addition to the return of ExxonMobil's property, if ExxonMobil is successful in demonstrating liability. Before commencing with discussion, analysis and conclusions on this point, some disclaimers are in order.

(a) *First*, the Independent Expert was tasked with researching and opining on the elements of the tort of *ghasb*. He was not asked to identify or consider other potential theories of liability under Saudi Arabian law or Islamic law.

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[70] See Siraj at 200.

(b) *Second*, the Independent Expert was not tasked with determining whether the Board of Grievances, or other Saudi Arabian court, would entertain a claim of *ghasb* as defined in Islamic law based on the facts and circumstances alleged by ExxonMobil, or at all. Because the nature and scope of the recovery available to ExxonMobil—if it is successful in demonstrating liability—may well depend on the theory of liability under which a Saudi Arabian court would have characterized the case, my response to this question will necessarily be limited to recovery arising under the theory of *ghasb*.

(c) *Third*, during the time allotted for the preparation of this report, I have been unable to locate copies of any cases in which the Board of Grievances or any other Saudi Arabian court ruled in a case of *ghasb* and/or articulated the nature or scope of the recovery available to the aggrieved party in such a case. I have previously observed that there is no doctrine of *stare decisis* in Saudi Arabia and thus the decisions of courts in Saudi Arabia do not have binding precedential effect. Nevertheless, locating cases relevant to *ghasb*—if there are any to be found—would provide insight into the approach taken by the Saudi courts on this issue; determining that there are no such cases to be found would provide a different sort of insight.

74. I recognize the importance of a fair and accurate evaluation of the possible extent of ExxonMobil's right to recover if it establishes liability. Very large sums of money are at stake. Assuming that liability can be established, an expert report containing an overly narrow interpretation of the allowable types of recovery would unfairly limit ExxonMobil's ability to be compensated for its losses. By the same token, an expert report containing an overly broad interpretation of this issue would unfairly expand SABIC's exposure for damages. Because I have been entrusted by this Court with a weighty responsibility, in a case where the stakes are high, I am anxious for my conclusions to be as accurate as possible, and based upon a comprehensive review of source material to the maximum extent practicable.

75. In light of the foregoing, and pursuant to telephone conversations with Judge Jurden on 20 February and 21 February, the Independent Expert is providing the Court with preliminary conclusions on issues related to the possible measure of damages. I will conduct further research (likely including travel to Riyadh) and endeavor to provide a supplementary report to the Court by the close of business on 5 March 2003.

Remedies for Wrongful Use of Property—General Overview

76. Generally speaking, without reference to any particular legal system, there are three broad categories under which ExxonMobil might seek compensation for the use of its property by SABIC, in addition to the return of such property, assuming of course that ExxonMobil successfully demonstrates liability on the part of SABIC. The three categories are: (a) interest on the sums wrongfully taken; (b) the revenues or profits ExxonMobil lost because it was deprived of the use of its property; or (c) the revenues or profits SABIC earned because it had the use of ExxonMobil's property.

77. The first two categories reflect remedies that are widely accepted in the American legal system; however, as will be demonstrated below, are not accepted in the Saudi Arabian legal system. The third category seems more unusual in the American context (perhaps because of the complex issues of proof that it may entail) but is endorsed in the writings of Hanbali legal scholars including Ibn Qudama, Buhuti, Shamsuddin Ibn Qudama Al Maqdisi, and the modern author Ahmad b. Abdullah Al Qari, all of whom enjoy significant respect among Saudi judges.

Interest

78. Islamic law prohibits *riba* (usury). There is significant scholarly debate among some contemporary Muslims as to whether the term *riba* includes all interest (*fa'ida*) or whether the term is narrower in scope. However this academic debate may eventually be resolved, the courts in

Saudi Arabia currently take the position that all interest constitutes *riba* and is thus prohibited under Islamic law.

79. Prior expert testimony submitted by Kevin R. Taecker on behalf of ExxonMobil stated, among other things, that (a) most banks in Saudi Arabia engage in substantial transactions that involve the payment and receipt of interest, albeit normally under other names such as "commission" or "fee rates." (b) the Saudi Arabian Monetary Agency ("SAMA") publishes Saudi riyal interest rates and (c) the time value of money is recognized. Although this description of the Saudi Arabian banking sector is largely accurate based on my personal experience in the Kingdom, it is not on point.

80. The time value of money has been recognized by Islamic legal scholars for centuries[71], and it is well known in various commercial contexts in Saudi Arabia. The payment and receipt of interest is also widespread in Saudi Arabia. However, a Saudi Arabian court will not order the payment of pre-judgment interest, nor will such a court normally enforce a contractual obligation to pay interest. Courts in Saudi Arabia normally take the position that the Islamic law ban on *riba* renders obligations to pay interest void on public policy grounds.

81. On rare occasions, Saudi courts have been known to enforce contractual obligations to pay interest. Such cases typically have arisen in situations where a Saudi Arabian party sought to escape an obligation to pay interest on a loan he freely contracted with full knowledge that it was interest-bearing. Faced with such a fact situation, some Saudi courts have concluded that the balance of equities would not favor rewarding the party seeking to escape its contractual obligation. Accordingly, the Saudi court has ordered that the contracted-for interest be paid to charity.

82. The Board of Grievances has from time to time ordered compensation for "cost of funds" in cases where the

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[71] See, for example, Kasani, 5 *KBS* at 200.

defendant has delayed payment for an agreed-upon project. Although the "cost of funds" typically represents an interest rate that the party has paid for money borrowed to finance the project, the Board of Grievance practice of awarding damages in respect thereof should not be construed as a precedent for the recovery of interest in general. "Cost of funds" claims are viewed by the Board of Grievances as an element of the plaintiff's actual, provable damages. Therefore, recovery can occur only if the claim is supported by evidence of the loan and proof that the amounts actually expended are attributable to the delay in payment.

83. The conclusions stated in Paragraphs 78 through 82 are based on my personal experience and knowledge gained anecdotally from my commercial law practice in and relating to Saudi Arabia.

Lost Profits

84. A Saudi court will not normally award compensation in respect of lost profits.[72] Saudi courts normally limit their awards to actual, provable, quantifiable damages. The reluctance to award damages for lost profits derives from a perception that claims for lost profits are inherently speculative, and thus involve an unacceptable degree of *gharar* (risk).

85. Al Qari takes the position in the *Majalla* that compensation for lost profits should not be awarded even in cases of *ghasb*.[73]

Compensation for Actual Profits Attributable to Usurped Property

86. There is support in Islamic law sources, including within scholarly treatises within the Hanbali guild that is respected in Saudi Arabia, for the proposition that in a case

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[72] See, for example, Judgment of 16 Muharram 1409, Commercial Disputes Settlement Board, Jeddah, Saudi Arabia (unpublished case).

[73] Al Qari, *Majalla* § 1397.

of *ghasb*, the rightful owner can recover compensation for part or all of the profits actually earned by the usurper. I am not aware of any cases in the Saudi Arabian courts in which this remedy has been awarded (although I have not had the opportunity to complete case law research, as discussed above), but there is solid support in Hanbali *fiqh* treatises for such type of recovery.

87. The basic rule in *ghasb* is that the actual property that is wrongfully taken must be returned. A complex series of rules govern special circumstances where the wrongdoer must return (a) the value of the property taken, (b) a substitute for the property taken, (c) compensation for damage or loss in the value of the property taken and/or (d) proceeds of the property taken.

88. The rule on proceeds itself has many complicated aspects which govern, for example, the yield of agricultural crops, the offspring of animals and other situations. The major Hanbali *fiqh* scholars generally hold that if the wrongdoer trades or invests the property, the proceeds thereof belong to the true owner.[74] This rule also appears in the U.A.E. Civil Code. A minority of Islamic law scholars argue that the proceeds should be donated to charity.

89. Special rules apply to cases where currency is taken wrongfully and commingled with the wrongdoer's own funds.[75] In such cases, a constructive partnership is deemed created in the commingled account, with the true owner having a percentage interest therein corresponding to the ratio between the cash value of his property and the total cash value of the commingled account at the time of the wrongful taking. Essentially, this special rule simply restates the principle set forth in the second sentence of the preceding

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[74] See, for example, Al Qari § 1396; Buhuti, 4 *Kashshaf al-Qina'* at 113 and 2 *Sharh* at 422; Ibn Qudama 7 *Mughni* at 86; Ibn Qudama al-Maqdisi, 7 *Sharh Kabir* on the margin of *Mughni* at 117.

[75] The *fiqh* scholars discuss dinars (gold coins) and dirhams (silver coins), but there is no reason to believe that the same rule would not apply to U.S. dollars and Saudi riyals.

paragraph, but refines it to allow the wrongdoer to retain the proceeds on his own equity, while returning the proceeds on the original owner's equity to him.

90. I plan to conduct additional research to evaluate whether the remedies discussed in paragraphs 88 and 89 have been imposed by Saudi Arabian courts.

_____

Herbert S. Wolfson

Sworn to and subscribed to before me
this 21st day of February, 2003

APPENDIX 1

HERBERT S. WOLFSON
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Philadelphia, Pennsylvania 19101
Phone (215) 523-6988 • Fax (215) 523-9274
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SKILLS SUMMARY

- Lawyer with more than 12 years of experience including practice in the United Arab Emirates and Saudi Arabia.
- Top academic credentials; rated AV by Martindale-Hubbell.
- Fluent in Arabic; extensive Middle East experience.
- Familiarity with banking, financial and legal systems in the Gulf region and transactions between Dubai and Pakistan.

EDUCATION

A.M., 1991 *University of Pennsylvania* *Philadelphia*
Arabic and Islamic Studies (Department of Oriental Studies). Translated Arabic text on Islamic legal philosophy for Master's thesis.

1988-1989 *American University in Cairo* *Cairo, Egypt*
Fellowship at the Center for Arabic Studies Abroad, a U.S.-government funded program for intensive Arabic study in Egypt.

J.D., 1988 *University of Pennsylvania* *Philadelphia*
School of Law. Magna cum Laude, Order of the Coif.

B.A., 1985 *University of Pennsylvania* *Philadelphia*
Department of Oriental Studies and Department of International Relations. Magna cum Laude, honors in both majors. Benjamin Franklin Scholar, University Scholar.

LEGAL EXPERIENCE

1999-
Current *Law Offices of Herbert S. Wolfson Philadelphia*

Advised U.S. clients on franchises, defense contracts, joint ventures and other business relationships in the Middle East including Saudi Arabia and the United Arab Emirates. Advised a domestic biotechnology company and a domestic supplier of civil and military aircraft parts. Represented an overseas entity in connection with the Chapter 11 bankruptcy of its U.S. franchisor. Drafted and negotiated documentation for the acquisition of a controlling interest in an overseas brokerage firm. Analyzed Egyptian law and advised client on a property law dispute in a U.S. court, thereby assisting the client in obtaining a very favorable settlement

1992-1998 *Afridi & Angell* *United Arab Emirates*

As lead attorney, represented the U.S. shareholder in all aspects of the first private-sector IPO with foreign participation in Abu Dhabi. Drafted, negotiated and reviewed concession documents on behalf of U.S. and international clients for infrastructure development, privatization and technology transfer projects in the U.A.E., Pakistan and India, including independent power projects in Pakistan, India and Abu Dhabi and a waste recycling facility in Dubai. Negotiated and drafted master franchise agreements with major U.S. entities. Drafted and negotiated joint venture agreements and distributorship agreements and counseled international clients on local laws and the extra-territorial impact of U.S. law, including the Foreign Corrupt Practices Act, Iran-Libya Sanctions Act and antiboycott matters.

1991- 1992 *Baker & McKenzie* *Saudi Arabia*

Drafted and negotiated joint venture and distributorship agreements and counseled clients on various aspects of doing business in Saudi Arabia.

1989- 1990 *Kirkpatrick & Lockhart* *Washington*

Associate attorney, 1940 Act practice group.

ARABIC LANGUAGE—FUNCTIONAL EXPERIENCE

Translated complex legal texts from Arabic to English including:

- United Arab Emirates Securities Exchange Act of 2000.
- United Arab Emirates Patent Act of 1992.
- Judgments of the United Arab Emirates courts (including handwritten rulings of the U.A.E. Federal Court of First Instance in Abu Dhabi).

Analyzed complex Arabic texts including:

- Prospectus in U.A.E. securities offering.
- Legal pleadings filed in civil and criminal cases before the U.A.E. courts.
- Handwritten transcripts of police interviews in U.A.E. criminal investigations.
- Statutes and regulations in the U.A.E., Bahrain, Qatar, Saudi Arabia, Kuwait and other jurisdictions.
- Treatises on law and legal practice.
- Official documents and records such as licenses, permits and title deeds.
- Classical texts on Islamic legal theory and Islamic legal philosophy.

Shared in drafting and review of Arabic documents including:

- Franchise agreements and other commercial agreements.
- Legal pleadings filed in civil and criminal cases before the U.A.E. courts.

- Formal correspondence to government officials.

Participated in meetings with clients and government officials:

- Conducted substantially in Arabic; or
- In which some participants spoke primarily in Arabic and other participants spoke primarily in English.

PUBLICATIONS AND LECTURES

"Islam, Islamic Law, International Law and Terrorism," lecture presented on May 11, 2002 at the 2002 Spring Meeting of the American Bar Association, Section of International Law and Practice.

"Securities Regulation in the United Arab Emirates: Analysis of Recent Developments" *Middle East Executive Reports*, (April 2000).

"Qatar Establishes Doha Stock Exchange" *Middle East Executive Reports*, August 1995.

"Trademark Registration: Changes in Procedures" *Middle East Executive Reports*, November 1994.

"U.A.E. Federal Commercial Code Record-Keeping Requirements" *Middle East Executive Reports*, November 1993.

"United Arab Emirates: Implementing Regulations to Copyright Law Issued" *Middle East Executive Reports*, October 1993.

"WIPO Suggestions to Bring New U.A.E. Copyright Law to International Standards" (with Charles S. Laubach), *Middle East Executive Reports*, July 1993.

"United Arab Emirates: New Patent Regulations" (with Charles S. Laubach), *Middle East Executive Reports*, June 1993.

"United Arab Emirates: Trademark Regulations Issued" *Middle East Executive Reports*, March 1993.

"Special Report on the United Arab Emirates" (with Philip J. Azar) in *Ideas in the Making: A Guide to the Consolidation of Intellectual Property Legislation*

(Special Supplement to the *International Financial Law Review*, September 1992).

"Saudi Arabia: New Regulation Governing Professional Partnerships" *Middle East Executive Reports*, November 1991.

MAJOR REPRESENTATIONS

Abu Dhabi Ship Building

Represented Newport News Shipbuilding & Dry Dock Company (a U.S. defense contractor) in negotiations with the Government of Abu Dhabi for the establishment and initial public offering of a public shareholding company, and that company's acquisition of Abu Dhabi Dry Docks Company.

Aerospatiale Missiles

Represented French defense contractor in the establishment of GAM-AERO LLC, an Abu Dhabi joint venture with Gulf Aircraft Maintenance Company, under the auspices of the U.A.E. Offsets Program.

Civil Litigation in the Abu Dhabi Courts

Oversaw the successful defense of:

- a U.S. hospital management company in a medical malpractice case arising from a patient's accidental infection with HIV.
- a U.S. oilfield services company in a wrongful death case brought by the family of one its employees.

Combined Cargo LLC

Represented United Technical Services, a U.A.E. company, in the establishment of a joint venture for chartering cargo vessels. Other participants in the joint venture included ADIC (the inward investment arm of the Government of Abu Dhabi), a French defense contractor, a Norwegian shipping company and other private and institutional shareholders.

Dubai Municipality

Drafted and negotiated concession agreements in a BOT waste recycling project for a Dubai government agency.

McDonalds Franchise

Represented the son of the Ruler of Abu Dhabi in various commercial matters, including negotiating master franchise agreements with McDonalds.

Liberty Power Limited

Negotiated gas supply agreements, implementation agreements and other concession documents for the developer of a 235 MW power project in Pakistan.

Fashion Cafe Matters

Represented a Dubai-based group in various transactions including Fashion Cafe franchise, Fashion Cafe bankruptcy proceedings and other matters.

Taweelah A2 Project

Pre-bid advice to a U.S. power developer regarding the first independent power project in Abu Dhabi.

White Collar Crime

Represented a Pakistani bank in efforts to trace and recover ill-gotten gains through proceedings in New York and the United Arab Emirates.

PROFESSIONAL MEMBERSHIPS

American Bar Association.

National U.S.-Arab Chamber of Commerce.

SELECTED LIST OF ARABIC LANGUAGE INSTRUCTORS

University of Pennsylvania (Philadelphia, Pennsylvania)

- Professor Emeritus George S. Makdisi
- Professor Roger M.A. Allen

American University in Cairo (Cairo, Egypt)

- Professor Abbas El-Tonsi
- Professor Nabila El-Assyiouti

SELECTED REFERENCES FOR ARABIC LANGUAGE SKILLS

- Dr. Shawkat M. Toorawa (Cornell University)
- Dr. Joseph E. Lowry (University of Pennsylvania)
- Charles S. Laubach, Esq. (Afridi & Angell, Abu Dhabi)

OTHER

Married, one child.

Other languages: French (limited working proficiency), some Turkish, some Tagalog.

APPENDIX 2

List of Materials Reviewed by the Independent Expert

A. Treatises on Islamic Law

Buhuti, Mansur b. Yunus b. Idris (d. 1641). *Kashshaf al-Qina'* (Beirut: Dar al-Fikr, 1982).

_____. *Al-Rawd Al-Murbi'* (Beirut: Dar al-Arqam, 1993).

_____. *Sharh Muntaha Al-Iradat* (Madina: Maktabah Salafiyah, 1979).

Dardir, Ahmad b. Muhammad (d. 1786). *Al Sharh Al-Saghir* (Khartoum: Dar al-Sudaniyya, 1998).

Ibn Hazm, Abu Muhammad Ali b. Ahmad b. Sa'id (d. 1064), *Al Muhalla* (Beirut: Dar Al-Afaq Al Jadida).

Ibn Qayyim Al Jawziyya, Shams al-Din Abu Abdallah Muhammad b. Abu Bakr (d. 1350). *I'lam Al-Muwaqqi'in* (Cairo: Dar Al Hadith).

Ibn Qudama, Muwaffaq Al Din Abu Muhammad Abdullah b. Ahmad b. Muhammad (d. 1223), *Al Mughni* (Cairo: Dar Al Hadith).

_____. Sharh *Al-'Umda* (Beirut: Maktaba Asriyya, 1995).

Kasani, Ala' al-Din Abu Bakr b. Mas'ud (d. 1191). *Kitab Bada'i' Al-Sina'i' fi Tartib al-Shara'i'* (Beirut: Dar Al-Kutub Al-'Ilmiyya, 1986).

Malik. b. Anas, *Al-Muwatta'* (Cairo: Dar Ihya' Al-Kutub Al-Arabiyya).

Maqdisi, Baha Al-Din Abu Muhammad Abdurrahman b. Ibrahim (d. 1227), *Al-'Udda* on the margin of *Sharh al-'Umda* (Beirut: Maktaba Asriyya, 1995).

Maqdisi, Shamsuddin Abu Al Faraj Abdurrahman b. Abi 'Umar b. Muhammad b. Ahmad b. Qudama (d. 1283), *Al Sharh Al Kabir* on the margin of *Al Mughni* (Cairo: Dar Al Hadith).

Qari, Ahmad b. Abdallah, *Majallat Al-Ahkam Al-Shar'iyya* (Riyadh: Tihama Publications, 1981).

Sarakhsi, Shams al-A'imma, Abu Bakr M. b. Abi Saleh (d. 1056), *Kitab Al-Mabsut* (Beirut: Dar Al-Ma'rifa, 1986).

Sawi, Muhammad b. Muhammad al-Shadhli al-Khalwati (died 1825). *Balghat al-Salik li Aqrab al-Masalik ila Madhhab al-Imam Malik on the margin of Al Sharh Al-Saghir* (Khartoum: Dar al-Sudaniyya, 1998).

Shafi'i, Muhammad b. Idris, *Kitab Al-Umm* (Beirut: Dar Al-Ma'rifa).

Tahawi, Abu Ja'far Ahmad b. Muhammad (d. 933). *Kitab Al-Shurut Al-Kabir*, reproduced in Wakin, Jeannette, *The Function of Documents in Islamic Law* (Albany: State University of New York Press, 1972).

B. Other Primary Sources

Board of Grievances, Kingdom of Saudi Arabia. *Majmu 'at al-Mabadi' al-Shar'iyya wa al-Nizamiyya allati Qarraratha Hay'at wa Lijan wa Dawa'ir al-Diwan* (Riyadh: No date).

Judgment No. 186/T/3 of the Year 1420H of the Board of Grievances (Saudi Arabia).

Ministry of Commerce, Kingdom of Saudi Arabia. *Majmu'at al-Mabadi al-Nizamiyya fi Mawwad al-Awraq al-Tijariyya* (Riyadh: Al-Sharif Press, no date).

Nizam Diwan al-Mazalim (Royal Decree No. M/51 of 17 Rajab 1402).

Nizam al-Mahkama al-Tijariyya lil-Mamlaka al Arabiyya al-Sa'udiyya (Royal Decree No. 32 of 15 Muharram 1350).

Nizam al-Murafa 'at al-Shar'iyya (Royal Decree No. M/21 of 20 Jumada 11421).

Nizam al-Qada' (Royal Decree No. 38 of 22 Shawwal 1377).

Nizam al-Sharikat (Royal Decree No. M/6 of 17 Rabi' I 1385, as amended).

Nizam Tarkiz Mas 'uliyat al-Qada' al-Shar'i (Royal Decree No. 109 of 24 Muharram 1372.

Nizam al-Tahkim wa al-La 'iha al-Tanfidhiyya li-Nizam al-Tahkim (Royal Decree No. M/46 of 12 Rajab 1403).

Qawa 'id al-Murafa'at wa l-Ijra'at Amam Diwan al-Mazalim.

C. Secondary Sources

Abu Sa'ad, Muhammad Shita, *Al-Shari ka Wasf lil-Taradi fi al-Qanun al-Madani al-Muqarin wa al-Shari'a al-Islamiyya* (Cairo: Alain al-Kutub, 1981).

Ahmad, Fu'ad Abdulmun'im and Ghunaym, Al-Hussein Ali, *Al Waseet fi al-Tanzim al-Qada'i fi al-Fiqh al-Islami ma'a al-Tatbiq al-Jari fi al-Mamlaka al-Sa'udiyya wa Misr wa al-Kuwait.* (Alexandria: Mu'assasat Shabab al-Jami'a, 1992).

Al Shaykh, Abdulaziz b. Abdullah b. Hasan. *Lamahat Hawla al-Qada' fi al-Mamlaka al-Arabiyya al-Sa'udiyya* (Riyadh: Dar al-Shibl, 1990).

'Ashaush, Ahmad Abdulhamid, *Al-'Uqud Al-Madaniyya fi al-Shar'iyya al-Islamiyya ma'a al-Ihtimam bi al-Rajih min Madhhab al Imam Ahmad b. Hanbal al-Ma'mul bihi ua alNafidh fi al-Mamlaka al-Arabiyya al-Sa'udiyya: Dirasa Muqarina* (Jeddah: Dar Tharwat lil-Nashr, 1992).

Coulson, N.J. *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1978).

Fadel, Muhammad. *Adjudication in the Maliki Madhhab.* Unpublished Dissertation from the University of Chicago, December 1995. UMI Dissertation Services.

Jackson, Sherman. "Domestic Terrorism in the Islamic Legal Tradition," 91 *The Muslim World* 293 (Fall; 2001).

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D. Prior Expert Testimony

Prof. Wael B. Hallaq

Expert Report of Wael B. Hallaq dated 12 September 2002.

Declaration of Wael B. Hallaq dated 13 September 2002.

Second Declaration of Wael B. Hallaq dated 16 October 2002.

Transcript of 6 December 2002 Deposition of Wael B. Hallaq.

Exhibits PLF. 646-653 to the 6 December Deposition of Wael B. Hallaq.

Ziad A. Al-Sudairy, Esq.

Expert Report of Ziad A. Al-Sudairy dated 14 November 2002.

Transcript of 26 December 2002 Deposition of Ziad A. Al-Sudairy.

Exhibits PLF. 619-627 to the 26 December Deposition of Ziad A. Al-Sudairy.

Mr. Kevin R. Taecker

Expert Opinion of Kevin Rollin Taecker dated 14 September 2002.

Exhibits 1-10 to 13 November 2002 Deposition of Kevin R. Taecker.

Prof. Frank E. Vogel

Affidavit of Frank E. Vogel dated 16 September 2002.

Rebuttal Affidavit of Frank E. Vogel dated 22 October 2002.

Transcript of 9 December 2002 deposition of Frank E. Vogel.

Exhibits DFT. 118-128 to the 9 December deposition of Frank E. Vogel.

'Mohammed Salih Al-Zubair, Esq.

Rule 44.1 Declaration and Rebuttal Expert Report of Mohammed Salih Al-Zubair

Transcript of 12 December 2002 deposition of Mohammed Salih Al-Zubair.

Exhibits DFT 129-133 to the deposition of Mohammed Salih Al-Zubair.

E. Other Materials

SABIC's Brief in Support of its Motion for Summary Judgment on Limitations

ExxonMobil's Memorandum of Law in Support of Motion for Summary Judgment on Liability.

Memorandum of Law in Opposition to Plaintiff SABIC's Motion for Summary Judgment on Limitations.

SABIC's Reply Brief in Support of its Motion for Summary Judgment on Limitations.

SABIC's Brief in Opposition to Defendants Motion for Summary Judgment on Liability.

Reply Motion of Law in Further Support of Defendants Motion for Summary Judgment.

APPENDIX Q

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	
v.	)	C.A. No. 00C-07-161-JRJ
MOBILE YANBU PETRO-CHEMICAL COMPANY, INC., and EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	

SUPPLEMENTARY REPORT
OF THE INDEPENDENT EXPERT
HERBERT S. WOLFSON

1. This report supplements my report dated 21 February 2003. It is based on the materials cited in Appendix 2 to my earlier report, as well as certain additional materials cited in Exhibit 1 to this report. As contemplated in my earlier report, I traveled to Riyadh to conduct further research concerning the remedies available for *ghasb* in the contemporary Saudi Arabian legal system. Among other things, my research in Riyadh included discussions with a *shari'a* court judge,[1] a former Shari'a Court judge who now serves in the Saudi Arabian Ministry of Justice in an administrative capacity, and officials of the Board of Grievances.

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[1] A judge serving in the Superior Court of Riyadh (*al-Mahkama al-Kubra bi al-Riyadh*).

2. I also had extensive meetings with Mohamed Al Sharif in preparation for my meetings with the judges. Although I did not give Mr. Al Sharif any documents related this case, I did ask him to sign a confidentiality undertaking pursuant to the Protective Order. A copy of Mr. Al Sharif's executed undertaking is attached as Exhibit 2 to this report.

3. Because of the time pressure under which the first report was prepared, I did not have the chance to proofread my first report as carefully as I would have liked. During my subsequent review, I noticed several typing errors and stylistic infelicities; I apologize for these and ask the indulgence of the Court and the parties.

4. Paragraph 73 of my earlier report indicated that I was unaware of any cases in which the Board of Grievances had ruled in a case of *ghasb* and/or articulated the nature or scope of the recovery available to the aggrieved party in such a case. During my visit to Riyadh, the judge at the Superior Court of Riyadh related his belief that the Board of Grievances had recently[2] ruled in a case involving *ghasb*. The administrative officials I met at the Board of Grievances had not heard of such a case but promised to look into it. Records at the Board of Grievances are filed by docket number and by the names of the parties, not by subject matter. Accordingly, it may be difficult to locate the case. However, I have left instructions with Mohamed Al Sharif to continue trying to obtain a copy of the decision, if it exists. A current recent Board of Grievances decision on *ghasb* would obviously be of great significance. Although court decisions in Saudi Arabia are not considered to be binding precedent, reviewing a recent decision is the best way to evaluate the approach likely to be taken by the Saudi courts on a similar question. In the event I manage to obtain additional information about this case, I will relay it to the Court and the parties.

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[2] *i.e.*, within the past two weeks.

Discussion and Analysis

Additional Comments about Ghasb

5. My initial report identified certain elements of the Islamic law tort of *ghasb*. As I re-read my report, I realize that my explanation of certain elements was not as articulate as I would have liked, and did not address the particulars of the instant dispute between SABIC and ExxonMobil. Therefore, I would like to add two clarifications. The first concerns the element of knowledge, and the second concerns the element of "taking."

A. Knowledge

6. Paragraph 72 of the First Report identified a requirement that the conduct be "open and notorious" in order to constitute *ghasb*. I used the term "open and notorious" as a shorthand label for a knowledge requirement inherent in the concept of *ghasb* within the Saudi Arabian legal system. While I stand by the substance of my conclusion, further reflection has led me to reconsider the use of the label, largely because the phrase "open and notorious" is a term of art in the American legal system and, as such, has connotations that may or may not be supported by the Arabic term.

7. Scholarly treatises that discuss the knowledge requirement tend to use the Arabic term *jahran* or the Arabic term *mujaharatan*. The basic concept conveyed by these Arabic terms is a lack of secrecy or lack of stealth. The terms are used to distinguish *ghasb* from other categories of wrongful taking that involve stealth. These categories include, among others, *sariqa* (stealing property from a place of safekeeping) and *ikhtilas* (the taking of property by guile and deception).

8. As stated in my initial report,[3] most Hanbali authors do not expressly identify *jahr* (lack of secrecy) as an element of *ghasb*; instead, Hanbalis tend to use *qahr* (lack of

[3] See Paragraph 59 of report dated 21 February 2003.

consent) to distinguish *ghasb* from the other types of wrongful taking mentioned in the preceding paragraph.

9. Also as stated in my earlier report,[4] Mr. Mohamed Al Sharif argues that *ghasb* requires knowledge, on the part of the victim, of (a) the property or the right that is being involuntary taken from him and (b) the method of the transgression against his rights. Obviously, a wrongdoer's "lack of stealth," or "non-concealment" (an objective standard) is not necessarily equivalent to the victim's "knowledge" (which involves subjective considerations).

10. However, my research in Riyadh confirmed my conclusion that current Saudi Arabian practice places greater emphasis on a subjective analysis of the victim's knowledge, and less emphasis on objective aspects of the wrongdoer's conduct. For example, a Saudi Arabian judge took the position that the element of *qahr* was used to describe the mental state of the victim of the alleged *ghasb*; knowledge (*'ilm*) of the wrongdoer's conduct is therefore an essential element of *ghasb* because without such knowledge, the victim cannot be said to feel *qahr*.[5] The judge's comments appeared to reflect a common understanding of *qahr* in contemporary Saudi Arabia that imposes a knowledge component, even though no such knowledge component explicitly appears in the major Hanbali sources.

11. As I reflect upon my initial report, I am concerned that my shorthand use of the American term "open and notorious" may confuse matters by inadvertently leading the Court, as well as SABIC and ExxonMobil, to bring to bear associations and connotations arising under American jurisprudence. As Prof Hallaq pointed out in his deposition testimony, it is frequently difficult to make a one-to-one correspondence between an American legal construct (open and notorious) and an Arabic word or phrase reflecting a concept that evolved differently in Islamic law. In the case of the

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[4] See Paragraph 60 of report dated 21 February 2003.

[5] Interview with Judge at Superior Court of Riyadh, 2 March 2003.

tort of *ghasb*, Saudi Arabian judges seem to be more concerned with the subjective inquiry of determining the knowledge and resulting mental state of the plaintiff (the alleged victim of *ghasb*) than with an objective evaluation of the "openness" or "notoriety" of the defendant's conduct. Thus, a Saudi judge reviewing the facts alleged by ExxonMobil might well be interested to learn the exact point in time at which ExxonMobil learned of the alleged overcharges by SABIC, because if a subjective knowledge requirement is posited, then there can be no *ghasb* before such knowledge arose.[6]

12. While I wished to draw the Court's attention to the knowledge requirement, I did not intend to invoke American jurisprudence on openness and notoriety. I apologize for allowing my haste to submit the preliminary report within the time allotted to override a careful and measured characterization of this important element of *ghasb*.

13. Having said all this, I do not believe that the presence or absence of "knowledge" would, by itself, be the dispositive factor in determining whether ExxonMobil could recover its principal losses if it can otherwise prove its case. Assuming the facts alleged by ExxonMobil to be true, and further assuming that ExxonMobil can prove all the elements of *ghasb* except the knowledge element, then a Saudi Arabian judge might well conclude that ExxonMobil had proved a case under some other theory of wrongful taking (perhaps *ikhtilas* or *khiyanat al-amana*), thereby entitling it to recover its property from SABIC. Note that in the Saudi Arabian system, it is not up to the plaintiff to charac-

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[6] It is worth noting that the point at which knowledge arises may differ from the perspectives of ECAI and Yanbu, on the one hand, and KEMYA and YANPET, on the other. Assuming the facts alleged by ExxonMobil to be true, then KEMYA and YANPET may also have claims against SABIC that differ in characterization from the derivative claims of ECAI and Yanbu. Indeed, the analysis of knowledge, consent, *qahr* and the other elements of *ghasb* might well differ if analyzed from the joint ventures' perspective.

terize the cause of action or rubric under which it seeks recovery; instead, the proper characterization of the case[7] is a matter within the exclusive authority of the judge.[8]

14. Characterization of the case as *ghasb* is theoretically relevant to a plaintiff's ability to recover the profits earned by the wrongdoer attributable to the wrongdoer's use of the plaintiff's property. However, in practice a Saudi Arabian judge is unlikely to award compensation in excess of the principal value of the property taken (see below) so this point may be moot in a Saudi Arabian court.

B. Saudi Arabian Corporate Law Issues Relevant to *Ghasb*

15. If ExxonMobil successfully demonstrates that SABIC wrongfully took its cash property, Saudi Arabian law offers various theories for ExxonMobil to recover the principal amount of the cash property wrongfully taken from it. However, based on my review of the documents, it is not clear whose property is alleged to have been wrongfully taken.

16. The expert testimony by Prof. Hallaq and Prof. Vogel appears to focus on two main issues: (1) whether a subsequent agreement, course of conduct or other extrinsic evidence could or did "trump" the express terms of Section 6.3 of the joint venture agreements and (2) whether the alleged overcharges constitute *ghasb*, assuming that Section 6.3 applies and that ExxonMobil is able to prove that such overcharges did occur. The learned professors overlook the fundamental question of whether the alleged overcharges, if proved, would constitute the taking of ExxonMobil's property by SABIC. Such an approach neglects fundamental issues of Saudi Arabian corporate law.

17. At the risk of stating the obvious, to the extent ExxonMobil seeks to recover from SABIC on the theory that SABIC wrongfully took ExxonMobil's property (as op-

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[7] *takyif al-qadiya*

[8] Interview with Judge at Superior Court of Riyadh, 2 March 2003.

posed to recovery based on an ordinary breach of contract or breach of duty claim, or some derivative claim on behalf of the joint ventures), ExxonMobil must demonstrate that the property allegedly taken rightfully belonged to ExxonMobil in the first place.

18. In evaluating whether ExxonMobil can so demonstrate, it is important to remember that both KEMYA and YANPET are Saudi Arabian limited liability companies and, as such, are independent entities with legal personalities separate from their shareholders.[9] Therefore, even assuming that SABIC did in fact overcharge KEMYA and YANPET for the Union Carbide technology in violation of Section 6.3 of the license agreements as alleged by ExxonMobil, and assuming further that the overcharge amounts are deemed to be the constructive property of KEMYA and YANPET, it does not automatically follow that such amounts automatically became ExxonMobil's property.

19. Applying ExxonMobil's theory that the overcharge amounts should be deemed the constructive property of KEMYA and YANPET, then the revenues of each such company, attributable to any given year in which SABIC is liable to disgorge an overcharge amount, should be deemed increased by the amount disgorged. The joint venture's financial statements for that year would then need to be restated to recalculate the amount of cash available for distribution to the shareholders. Performing such recalculation would necessitate adjustments to account for certain deductions that are calculated as a percentage of profits (such as mandatory statutory reserves).[10] The joint venture agreements, each company's memorandum of association and the Companies Regulation would then govern (a) the ratio in which any such additional amounts available for distribution

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[9] See Article 13 of the Companies Regulation.

[10] See Article 176 of the Companies Regulation, which requires 10% of profits to be set aside annually in a reserve fund until the amount of such fund reaches one half of the capital.

would be divided between SABIC and ExxonMobil and (b) the necessary procedural formalities required prior to such distribution.

20. Deeming the alleged overcharge amounts to be the constructive property of KEMYA and YANPET, and applying the analysis set forth in the previous paragraph, the gross principal amount of ExxonMobil's loss in any given year should be the difference between (a) what ExxonMobil's share of the net profits of KEMYA and YANPET would have been but for the overcharges and (b) the net profits (dividends) ExxonMobil actually received from KEMYA and YANPET. However, unless and until such joint venture duly resolved to distribute such amounts to the shareholders in accordance with the requirements of its constitutive documents and the Companies Regulation, it is not clear that such amounts should be deemed ExxonMobil's property. To maintain that undistributed assets constitute the property of the shareholders is to ignore the independent corporate personalities of KEMYA and YANPET under Saudi Arabian law.

21. In the instant case, the YANPET Memorandum of Association provides for the distribution of net profits, in the form of dividends, after the deduction of an amount recommended by the Board of Directors.[11] The KEMYA Memorandum of Association appears to require shareholder approval for the distribution of dividends.[12] The Companies Regulation also contemplates shareholder approval for the distribution of dividends.[13]

22. To the extent that ExxonMobil can prove the appropriate corporate authorities within KEMYA and YANPET adopted resolutions to distribute all (or a specified per-

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[11] See Section 50.2 of the YANPET Memorandum of Association.

[12] See Section 52.(c) of the KEMYA Memorandum of Association.

[13] See Article 175 of the Companies Regulation, which provides that the managers will provide "*recommendations* regarding the distribution of profits" (emphasis added).

centage) of each respective company's net profit in any given year (after deduction for the mandatory reserves and other similar items), then it can be argued that cash constructively owned by the relevant company in that year was constructively distributed as a dividend to ExxonMobil. In such circumstances, it could be further argued that by overcharging the joint venture, SABIC constructively took ExxonMobil's property. Note, however, that this argument relies on a chain of causation that may not necessarily appear immediately obvious to a Saudi Arabian judge.

23. If, however, the corporate decision approving the dividend refers to specific dollar amounts, then it can be argued that any sums in excess of the stated dollar amount were not distributed as dividends, regardless of whether or not they were constructively in the joint venture's possession pursuant to the overcharge theory or otherwise. If a sum of money belonging to the joint venture was not distributed to the shareholders, the money would remain an asset of the joint venture and, arguably, would not be an asset of ExxonMobil. If the money was not an asset of ExxonMobil, then arguably ExxonMobil did not suffer a "taking" of such asset.

24. ExxonMobil may well respond by pointing out that Islamic law does not recognize the concept of corporate personality and that Saudi practitioners often seem to blur the distinction between a company and its shareholders. While this is a fair point, the circumstances discussed in Paragraphs 15-22 above would at a minimum introduce ambiguity (*shubha*) as to the rightful ownership of the allegedly usurped assets. Such ambiguity would likely cause a Saudi Arabian judge to think twice before invoking the doctrine of *ghasb*.[14]

25. I was not provided with copies of shareholder resolutions approving dividend issuance; the content of such resolutions, if any, is a question of fact that remains to be

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[14] Interview with Superior Court Judge on 2 March 2003.

proved. However, if ExxonMobil is not able to demonstrate that its own property was taken, then ExxonMobil cannot be said to have suffered *ghasb*, even assuming that it proves the premium SABIC charged the joint ventures, over and above the price it paid to Union Carbide for the technology, was itself wrongful or impermissible.

26. The observation in Paragraph 23 makes no comment as to whether, in the absence of a *ghasb* claim, the facts alleged by ExxonMobil would support a claim for breach of contract, breach of trust or otherwise, nor whether—if it can prove that the alleged overcharge amounts ought to be deemed constructive assets of the joint ventures—ExxonMobil could now seek a compulsory distribution of such assets through the dividend process.

27. Nor does this observation address whether (a) KEMYA and/or YANPET could assert their own claims against SABIC using the *ghasb* theory or otherwise[15] or (b) the facts alleged would, if proved, support the imposition of the criminal penalties described in Article 229(6) of the Companies Regulation.

Damages

28. Assuming ExxonMobil is able to prove that SABIC is liable to pay compensation pursuant to its overcharge theory, then the principal amount recoverable by ExxonMobil may depend on whether the evidence supports a claim against SABIC for constructive taking (as described in paragraph 20), or whether the evidence supports a conclusion that the overcharge amounts constitute undistributed constructive joint venture assets (as described in paragraph 21).

29. In a constructive taking case, the principal amount recoverable by ExxonMobil would appear to be limited to

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[15] Although an issue would arise as to whether the license agreements constitute "permission" from each of KEMYA and YANPET that would be sufficient for SABIC to defeat a claim of *ghasb* by those entities.

the net dollar amount of the payment that each of ECAI and Yanbu would have received as dividends from KEMYA and YANPET, respectively, had the overcharges not occurred (minus, of course, the dollar amount of the respective dividend payments that ECAI and Yanbu actually received).

30. In an undistributed joint venture assets case, ExxonMobil would need to seek a current dividend distribution. The amount available for distribution would depend on the current financial picture of each joint venture.

31. In either event, it is worth noting that dividends paid to ExxonMobil would likely be subject to Saudi Arabian tax, and consequently the net amount of ExxonMobil's recovery would have to account for the amount of tax.[16] The applicable tax rate was revised downwards in the year 2000.[17]

Extent of Recovery if Liability is Proven

32. There has been vigorous dispute as to whether ExxonMobil is entitled under Saudi Arabian law to recover any amounts, in excess of the principal amount if ExxonMobil is successful in demonstrating liability. My earlier report identified three basic rubrics under which a plaintiff would ordinarily seek compensation in excess of the principal amount. The three rubrics are: (a) interest on the sums wrongfully taken; (b) lost revenues or lost profits attribut-

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[16] Note that if SABIC is subject to tax at all, it would be subject to *zakat*, a religious tax imposed on Saudi entities and calculated at the rate of 2.5%, compared to the 45% marginal tax rate previously imposed on foreign company income in excess of one million riyals (about $267,000) that applied before the Kingdom's recent tax reform legislation. The 2000 tax reforms reduced the maximum marginal rate to 35%. This observation gives rise to the question as to whether, assuming *ghasb* is proven, the amount of the property usurped should be, for purposes of calculating SABIC's profits thereon, the net amount ExxonMobil would have received after tax, or the actual amount SABIC received. This is a complicated, theoretical question which I believe is outside the scope of my current assignment.

[17] Ministerial Resolution No. 398/1 of 25 Safar 1421.

able to the loss of use of the property; or (c) the actual revenues or profits earned from the use of the property.

33. The first two rubrics are not available in Saudi Arabia. A Saudi Arabian court will not order the payment of interest because Saudi Arabian courts consider all interest to be prohibited *riba* (usury). Saudi Arabian courts also reject the lost profits remedy as too speculative.[18] The third rubric, the actual revenues remedy, is endorsed in the writings of Hanbali legal scholars.

34. Prof. Vogel mistakenly characterizes Hanbali legal scholarship when asserting, in paragraphs 14-19 of his Rebuttal Affidavit dated 22 October 2002, that the actual revenues rule does not apply to money. The writings of Ibn Qudama, Buhuti, Shamsuddin Ibn Qudama Al Maqdisi and Ahmad b. Taymiyya all expressly refer to money, including *dinars* and *dirhams* (meaning gold and silver coins) and the general term "cash" (*naqd*).[19] Ibn Qudama, Buhuti and Ahmad b. Taiymiyya, among others, expressly address the situation where the commingling of such money by the usurper makes it impossible to distinguish the usurped money from the rest. The approach taken by these authors is to deem the existence of a constructive partnership in the commingled assets. The usurper and the victim are deemed to have equity interests in such constructive partnership using the ratio between (a) the principal amount usurped from the victim and (b) the total amount of the commingled money at the time of usurpation.

35. Having said this, I conclude that Prof. Vogel is absolutely correct when he asserts that a contemporary Saudi Arabian judge is unlikely to award the actual revenues remedy in actual practice, at least in respect of money. Based on conversations with Saudi Arabian judges during my recent trip to Riyadh, there seems to be a deep-seated fear that the

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[18] The Superior Court judge described such profits as "*maznun*," meaning subject to doubt.

[19] See, for example, 4 Buhuti 112-113.

actual revenues remedy is a "back door" for claiming lost profits. Indeed, one judge began his discussion of this topic by expressly referring to the problems associated with claims for lost profits. While no judge definitively ruled out ordering the usurper to disgorge its actual profits on the usurped money to the victim, each judge interviewed took the position that (a) the rule permitting this is complicated, disputed and subject to many exceptions[20] and (b) determining whether or not the award of actual profits is an appropriate remedy will depend on the facts and circumstances of each specific case.[21]

36. A Saudi Arabian judge enjoys considerable discretion to rule in a manner leading to what he perceives as a fair and just result. Among the factors that might possibly enter into a Saudi judge's perception of the equities in the instant dispute between SABIC and ExxonMobil are (a) the court's perceptions as to the relative culpability of each party, (b) the lapse of time between the start of the alleged wrongful conduct and ExxonMobil's decision to file suit,[22] (c) a desire to find the middle ground between the competing litigants, (d) the sheer size of ExxonMobil's claim in terms of the absolute number of dollars at stake (and the attendant perception that awarding compensation above the principal amount might be "too much"), (e) a desire to balance ExxonMobil's right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC and/or (f) a concern that ExxonMobil's decision to invoke the Islamic law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or

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[20] My reading of the *fiqh* books suggests that the rule itself is not very complicated, is not disputed within the Hanbali guild, and is not subject to many exceptions, but this is beside the point. The point is how a Saudi judge would react.

[21] Interviews with Superior Court Judge and former judge now employed by Saudi Arabian Ministry of Justice, both on 2 March 2003.

[22] I recognize that the question of what ExxonMobil knew and when ExxonMobil knew it is very much a disputed issue in this case.

lost profits in Saudi Arabia and, thus, should not be rewarded.

37. It is my conclusion, based on everything I heard and observed in Riyadh, that if ExxonMobil proved facts sufficient to sustain a claim of *ghasb* in a Saudi Arabian court (and the presiding judge in fact characterized such facts as *ghasb*), such court has the discretion to order SABIC to pay ExxonMobil cash in excess of the principal amount ExxonMobil proved SABIC wrongfully took as a result of the alleged overcharges. However, a Saudi Arabian court would be unlikely to exercise its discretion in this manner, absent unusual facts and compelling circumstances, and would more likely confine its award to the actual principal amount of ExxonMobil's losses resulting from the alleged overcharges.

Herbert S. Wolfson

Sworn to and subscribed to before me this
5th day of March, 2003.

EXHIBIT I

List of Materials Reviewed by the Independent Expert in Preparing this Supplement

A. Primary Sources

Buhuti, Mansur b. Yunus b. Idris (d. 1641). *Kashshaf al-Qina'* (Beirut: Alam al-Kutub, no date). (note that this edition, which was made available to me in Riyadh, is not the same edition I cited in my earlier report; accordingly, the pagination may differ).

Ministerial Resolution No. 398/1 of 25 Safar 1421 of the Saudi Arabian Ministry of Finance.

Nizam al-Sharikat (Companies Regulation), Royal Decree No. M/6 of 17 Rabi I 1385, as amended.

B. Secondary Sources

Zarqa', Ahmad. *Sharh al-Qawa'id al-Fiqhiyya.* (Beirut: Dar al-Gharb al-Islami, 1983).

Zuhayli, Wahba. *Nazariyyat al-Daman, aw Ahkam al-Mas'uliyya al-Madaniyya wa al-Jina'iyya fi al-Fiqh al-Islami: Dirasa Muqarana.* (Damascus: Dar Al-Fikr, 1970).

EXHIBIT 2

Confidentiality Undertaking of Mohamed Al Sharif, Esq.

APPENDIX R

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	Judge Jurden
v.	)	Civil Action No. 00C-07-161 JRJ
MOBIL YANBU PETRO-CHEMICAL COMPANY, INC. -and- EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	
CITY of CAMBRIDGE	)	
	:ss.:	
STATE of MASSACHUSETTS	)	

AFFIDAVIT OF FRANK E. VOGEL CONCERNING MOTIONS FOR JUDGMENT AS A MATTER OF LAW

FRANK E. VOGEL, being duly sworn, does hereby depose and state as follows:

1. This report is prepared at the request of SABIC following a jury verdict in favor of ECAI and Yanbu on counts of both breach of contract and usurpation, and awarding, as to the claim of usurpation, enhanced damages. The latter damages were, as I understand it, calculated by positing that, to the extent of funds found to have been improperly charged to the joint ventures over a period of years, ECAI and Yanbu became constructive partners in SABIC

itself, and were entitled to a proportionate share of whatever profits SABIC enjoyed during those years. The conception of the damage award is to make SABIC disgorge profits it earned on the amounts the jury found it improperly charged the joint ventures.

2. SABIC will file motions for judgment as a matter of law as to several issues, or in the alternative, for a new trial or remittitur. Several of these motions proceed on the basis that fundamental errors in Saudi law have occurred in the course of the trial and in the outcome.

3. SABIC has asked me to prepare an opinion on whether the Court's rulings on Saudi law, its instructions to the jury, and the jury verdict itself, are in agreement with Saudi law. In preparing this affidavit, I have reviewed (in addition to materials I have earlier seen in preparing my previous reports) the following: transcript of the jury charge conference of March 19, 2003; transcript of the Saudi law hearing (which I attended) of March 7, 2003; transcript of the jury charge of March 20, 2003; the actual jury instructions; and relevant proposed jury instructions.

4. I welcome the opportunity to submit this report, since it is to me clear that the trial has resulted in an outcome that would be impossible to reach under Saudi law and that has relied on a number of erroneous conclusions about what Saudi law is. It is indeed unfortunate that, despite the tremendous expenditure of time and effort on expert opinions and testimony as to Saudi law, errors of the magnitude one observes in this case could persist. In this report, I hope to reiterate the facts about Saudi law in a clearer fashion than I may have achieved before, in hopes that these errors might still be rectified.

5. As a preliminary, hopefully not inappropriate, to my opinion, I must remark that these errors probably trace to the fact that Exxon-Mobil's expert in this case has inadequate knowledge of Saudi law and practice. Indeed, Dr. Wael Hallaq, despite the fact that he has never been to Saudi Arabia and has never been involved previously in a Saudi commercial case, made no effort to obtain from Saudi

judges or practitioners any knowledge of the law as actually applied in Saudi courts today. He asserted that knowledge as to whether particular interpretations of Islamic law are applied by Saudi courts was not needed for him to issue a sound opinion. (Saudi law hearing, 20-33.) He relies in his various opinions almost exclusively on books about Islamic law dating back at least several centuries. (List of works cited in his expert reports.). His positions imply, therefore, a view that Saudi law has not evolved in any respect (except episodically at the hands of individual judges) for hundreds of years. Probably because he lacks direct experience of Islamic law as it is actually applied in Saudi Arabia or elsewhere, he was led to propose highly theoretical or hypothetical notions of what Saudi law is, and to advocate outcomes that offend not just current Saudi practice but also basic Islamic legal doctrines and principles. (Examples appear below.) Further, he showed on several occasions indifference to, if not ignorance of, some of the most fundamental Islamic and Saudi legal principles applying to this case, both substantive and procedural. One stark example is his failure to discuss or even acknowledge many of the most ordinary, everyday conceptions by which Islamic law and Saudi courts decide and remedy claims for breach of contract such as were at issue in this case, conceptions that are moreover discussed in great detail in the standard modern treatises on the subject. (See expert report of Sept. 12, 2002, Para. 10; second declaration dated Oct. 16, 2002, paras. 7, 8; deposition testimony 183:14-188:20; Saudi law bearing, 36-38.)

6. As a further preliminary to my detailed opinion, I note that, for whatever reasons of conflicting expert testimony, two simple facts have in my view been given too little significance. One fact is that, despite an opportunity of over twenty years to observe Saudi commercial law and practice, I have never seen or heard of a usurpation case in a commercial context. Neither of the other experts could refer to one either. Yet, under Dr. Hallaq's version of Saudi contract law, which declares that any unlawful taking of another's property in a contract setting is usurpation, and which offers no theory for contract damages other than usurpation, usur-

pation cases would not only exist but be commonplace. The second fact is that I have also never seen or heard of a case where a Saudi court, in awarding judgment for a sum of money declared owing, has added to that judgment damages forcing the defendant to disgorge profits he earned from his illegal withholding of the money owed. If such a judgment were to issue, I would expect news of it to spread instantaneously among all Saudi practitioners, since it would appear to breach the Saudi judiciary's well-known adamant refusal to award interest on judgment sums, or, more generally, for delay in payment of money owed. I submit that these two simple facts suggest a need to inquire intensively into whether there are doctrines of Saudi law that stand in the way of such outcomes, and also a need for caution before crediting hypotheses about Saudi law that would lead to such outcomes. Finally, I recognize that some of the doctrines presented below may seem, on first acquaintance, exotic, antiquated, or even unfair according to presuppositions of our own. But this is not, of course, sufficient reason to exclude finding that they are in fact the law of Saudi Arabia as it is applied today.

OPINION

I. The Court's rulings and jury instructions on the elements of *ghasb*

A. The Court's construction of *ghasb* is erroneous under Saudi law

7. After hearing conflicting testimony, the Court developed its own definition of usurpation as follows:

> In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional. (Jury instruction 4.4, "Elements of Usurpation")

This definition, composed as it is of vague English terms not confined to their technical legal meanings, might arguably be interpreted to cover some, but not all, of the elements of the Islamic tort of *ghasb*. But to enable a jury to grasp certain distinctions vital to reproducing the Saudi and Islamic law on usurpation, this instruction needs much additional clarification and elaboration. If it is given to the jury without such explanations, it allows the jury to find usurpation where under Saudi law it does not exist at all. This is exactly what has happened in this case. The problem arises because one cannot take a complex doctrine, forged within a system of rules highly distinct from our own, translate it into a brief, vague English definition, and hope that such a definition alone can achieve sound conformity with Saudi law.

8. I discuss first how the instruction fails to capture the Saudi law of usurpation, and then how, as a matter of Saudi law, no usurpation exists in this case.

B. The elements of *ghasb*

9. I have discussed the Saudi law as to the usurpation in my prior expert reports and in my testimony at the Saudi law hearing. Here I try to give this law a clearer, more concise statement, partly by attempting to sum it up as four discrete elements. While I discuss these elements singly, one will observe how they overlap and interact with each other considerably.

1. Taking the property of another

10. This element is deceptively simple, seemingly easily summed up. But what is missing from the instruction is the added awareness that the gist of the tort of usurpation is invasion or aggression[1] against rights in property, against discrete *ownership* or actual *title*, as I expressed it at the Saudi law hearing. By "property" is not meant just any compensation to which a person becomes entitled due to

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[1] "Seizure" (*istila'*) is itself an essential element of usurpation. *See* al-Buhuti, *Sharh*, 2:398 ("usurpation does not occur without seizure").

damages caused by some wrongdoing (usually, *ta'addi*) of another person. Such a right to compensation, which usually requires adjudication to fix and determine, is not definitive enough in the Saudi and Islamic conception to be property subject to usurpation. If so broad a scope were given to the tort, then one might understand it as Prof. Hallaq (alone) does, as the standard remedy for breach of contract damages.

11. But the point goes further. It seems a vital distinction has been lost sight of in discussions of usurpation in this case. Thy gravamen of *ghasb* is aggression against title or ownership rights. But the essence of the complaint in this case is, in contrast, an act—an overcharge—explained variously as simple breach of contract, intentional breach of contract, deception, fraud, etc. Such an act, if it occurred, harms ECAI and Yanbu in pecuniary terms, but its essence remains breach of contract, deception, etc., *not* aggression against the ownership of property by ECAI and Yanbu. There is here a key distinction—between a tort against title or ownership versus all other sources of legal obligation. If one overrides this distinction, then indeed, as imagined by Prof. Hallaq, all causes of action for pecuniary damages may collapse into the tort of usurpation. The result is like a Saudi judge trying to understand our legal system who declares that, since all contract breaches and all torts involve trespass against the rights of another, he ought to decide all US contract and tort cases under the US law of trespass.

12. So far I have only explored the word "property." There remains "of another." "Another" refers to the owner of the property, who alone is entitled to compensation through the tort of usurpation. In the case before us, the owner of the property allegedly usurped is not either ECAI and Yanbu, but the joint ventures themselves. Even in old Islamic legal terms, which did not employ the notion of independent legal personality of companies, the assets of a partnership are held as undivided joint property, distinct from

partners' individual property or assets.[2] Therefore, a claim by one partner against another for the latter's alleged usurpation from the partnership is all the more clearly not a claim for usurpation but a claim for pecuniary loss requiring compensation, or for a theoretical diminution of the value of the partner's partnership share.

2. Without right

13. The Court's instruction does not reproduce this element, except perhaps indirectly with the terms "with blatant or reckless disregard for [the] property rights [of another]." An important distinction remains lacking, in that (as further established by the fourth element below) "without right" means in effect "without any color of right." Thus, as scholars emphasize, usurpation does not include takings for which a justification, even one that is false, fraudulent, or illegal, is involved.[3] For that reason, takings through breach of contract, even deliberate or deceptive breach of contract, would not constitute usurpation.

14. Perhaps this element can be given as the chief reason why commercial law cases only extremely rarely give rise to claims of usurpation. But it is not the sole reason. In fact, we may observe how excluding breach of contract and torts other than *ghasb* from usurpation is in fact supported and reinforced by *all* four of the elements identified here.

3. With intention

15. The Court's instruction first recognizes all or most of this element by the language "with blatant or reckless disregard for [the] property rights [of another]" but then

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[2] In *mudaraba*, a form of business relationship usually termed a partnership, one party sometimes is described as owning the principal. In other partnerships, such as the joint ventures here, termed "*'inan*" classically, capital is contributed by all partners and held in joint.

[3] S. Mahmassani, *al-Nazariyya al-'amma li-al-mujibat wa-al-'uqud fi al-shari'a al-islamiyya* [The general theory of obligations and contracts in the Islamic shari'a], 156; see also *al-Mawsu'a al-fiqhiyya*, 228-229.

undercuts it wholly or in part with the absolute statement "The conduct need not be intentional."

16. The Court may have included the final sentence because of statements by both Prof. Hallaq and Mr. Wolfson that usurpation involves no intent, a conclusion they drew from seeing specific cases in the Hanbali and other sources in which the conduct of a party liable for usurpation damages, while being objectively an invasion of property rights, was either subjectively innocent or not sinful or evil. Unfortunately for these two experts' thesis, modern scholarly treatments I have perused on usurpation, including a monographic work on the subject, all emphasize an element of intent.[4] At the Saudi law hearing, I had only moments to explain what in my view explains this discrepancy.

17. Based on my research, the error lies in failure to recognize that by "intent" here scholars mean intent as shown by weighing the objective circumstances of the taking. They are not concerned with the usurper's actual state of mind or *mens rea*. In other words, the scholars are concerned with whether objective circumstances indicate that the wrongdoer acted while aware of, and in spite of, the rights of others. When scholars discuss his actual state of mind, it is in connection with whether his act is also a sin (*ma'siya*) deserving repentance or a crime deserving chastisement (*ta'zir*).

18. In addition, Mr. Wolfson was misled by cases in the books concerning the liability of one who holds *bona fide* from a usurper. Such a holder is subjected to the same liability as a usurper by way of perfecting the victim's right to vindicate his ownership rights against whomever may be holding the property at the time. But Hanbali books specifically do not call a holder *bona fide* a usurper, and give him rights of subrogation or recourse against the true usurper. If on the other hand he is not a holder *bona fide*, and is

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[4] Sharara, 63; Mahmassani, 156-7; see Wolfson Report, para. 6, re Siraj.

aware of the fact of usurpation, then the books treat him as an actual usurper.[5] These cases therefore in fact support a requirement of intent. Prof. Hallaq offers no citations to specific cases, but did mention in passing a case where someone is given a robe to burn, but he chooses instead to appropriate it for his use as clothing, and this is held to be usurpation.[6] This case may have to do with whether we consider the conduct evil or sinful, but not with whether there must be intent to usurp, which in fact is indicated.

4. Forcefully and not surreptitiously or deceptively

19. This element is specifically stated as part of the Hanbali definition of *ghasb*. Immediately after the passage where al-Buhuti defines *ghasb*, he writes:

> [The] statement "by force" (*qahran*) is used to exclude cases of *sariqa* [theft, taking by stealth] and *ikhtilas* [embezzlement or misappropriation] and such like.[7]

Note how it is the term "by force," not the character of theft or embezzlement as crimes of various types as suggested by the other two experts (usurpation can also be a crime), that distinguishes usurpation from these other causes of action. Scholars consistently interpret the Hanbali requirement of "by force" (*qahron*) together with the Hanbali distinction of usurpation from theft and embezzlement, as excluding takings that are surreptitious or deceptive.[8] To my present knowledge no one other than Prof. Hallaq denies that the Hanbali term "*qahran*" excludes surreptitious or deceptive

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[5] Wolfson Report, paragraphs 63-66; al-Qari, *Majalla*, Secs. 1413 ff.

[6] Hallaq deposition, 188-189.

[7] *Sharh*, 2:399.

[8] Sharara, *Ahkam al-ghasb fi al-fiqh al-islami* [Doctrine of usurpation in Islamic law], 26-36 (various schools). Chiefly (but not exclusively) under this heading and in this context appears the notions I and others have tried to express with the English term "open and notorious."

takings. Prof. Wolfson acknowledges it. Yet the Court's instruction omits it.[9]

20. Perhaps we can better grasp why authorities exclude surreptious or deceptive takings from *ghasb* now that we have examined the essence of this tort—aggression against property rights—in detail by parsing out its elements. All the elements tend to reinforce the exclusion of the surreptitious or deceptive: the tort must be intentional (objectively indicated as an intentional aggression against another's property); "forceful" (in effect, overpowering, or rendering irrelevant, any opportunity for recourse by the victim); without color of right (even one that is illegal or illegitimate, such as deceitful or intentional breaches of contract); and against the property of another (wrongful specifically because it attacks ownership or title).

21. In view of the above, it is clear that the Court's instructions fail to convey correctly the nature of usurpation under Saudi law. They blur or omit key distinctions and requirements without which the jury could not correctly apply the relevant Saudi law.

C. Usurpation does not exist in this case, as a matter of Saudi law

22. Due to errors in the jury instruction, the jury found usurpation despite the fact that, on the undisputed facts and pleadings of this case, not even one of the four crucial elements of the tort exists. (Statements about facts herein are based on my review of the documents identified in my earlier reports and from attending the Saudi law hearing on March 7, 2003.) According to my perspective relying solely on Saudi law, the Court should have granted a motion for judgment as a matter of law finding that the evidence does not establish a claim for usurpation.

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[9] The term "blatant," especially when an alternative "reckless" is offered, surely is not adequate to convey such a complex legal rule.

23. The reasons for my view are clear given the above. In brief, the wrong alleged is not in essence one against property or title, but one of fraud, deception, breach of fiduciary duty, breach of contract, etc. The property allegedly aggressed against is not that of ECAI and Yanbu, making their claim all the more one for a cause of action distinct from usurpation. The taking was not without, but rather with, color of right, in that it was based on interpretations of the parties' contract that were allegedly either innocent and erroneous, deceptive, or fraudulent, but that did exist. The taking was—by ECAI's and Yanbu's constant admission—surreptitious and deceptive, not forceful (*qahran*). The circumstances do not show an intent in SABIC specifically to usurp ECAI's and Yanbu's ownership rights.

II. Even if usurpation did exist, no enhanced measure of damages is allowable, as a matter of Saudi law

24. Once again, I discuss the jury instruction given on this point, and then whether, based on Saudi law and assuming usurpation were to exist in this case, a claim for enhanced damages in usurpation could be established on the facts of this case.

A. The Court's construction of enhanced damages in *ghasb* is erroneous under Saudi

25. The Court's instruction on this point reads:

> If you find in favor of Mobil or Exxon on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operations the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest. (6.4)

(I shall refer to the damages disgorging SABIC profits on usurped monies as "enhanced damages.") Once again, a number of considerations fundamental to grasping the relevant Saudi law are missing from the instruction, allowing the

jury to decide the case in a manner unrelated to actual Saudi law. There are three such major considerations. These considerations were not understood or appreciated by the other two experts in the case, even by Mr. Wolfson who nonetheless came to an appreciation, from his visit to Saudi Arabia, how unlikely it would be for a Saudi court to award such damages.

1. The distinction between concrete property (*'ayn*) and abstract or generic property (*dayn*)

26. This distinction, seemingly archaic and scholastic, in fact plays a crucial role in this case according to the explicit Hanbali sources and actual contemporary Saudi practice.

27. The distinction is quite simple to explain. The notion of concrete property (*'ayn*) applies to specific, unique, actual objects, such as this horse, or that antique table. Generic or abstract property (*dayn*) is instead property defined by generic characteristics to which many possible individual objects would correspond, such as a two-year old gelding, or a 1999 Buick sedan.

28. This distinction plays a key role in many doctrines of Islamic property, contract and tort law, as all scholars agree. I discuss the distinction at length in my writings on contract law.[10] It gains most of its importance from its interaction with Islamic laws as to usury (*riba*) and indeterminacy or risk (*gharar*), laws which, as scholars modern and classical state and as I show in my writings on contract law, play the crucial role in shaping the Islamic law of obligations. Because of the centrality of usury and risk considerations, and in turn the centrality to these of the distinction between *'ayn* and *dayn*, the distinction between *'ayn* and *dayn* is of-

[10] Frank E. Vogel and Samuel L. Hayes, III. *Islamic Law and Finance: Religion, Risk and Return* (Boston: Kluwer Law International, 1998). 94-5 and passim; Frank E. Vogel, "The Contract Law of Islam and of the Arab Middle East," unpublished manuscript provided to defendants.

ten critical in determining outcomes in tort and contract cases.

29. Undergirding the importance of the distinction is a hadith or saying of the Prophet Muhammad forbidding "the sale of *dayn* for *dayn*," i.e., transactions in which the consideration on both sides is only abstractly known, not concretely existent.[11] This saying operates to prevent some of the most common forms of dealing in interest, such as the discounting of debts. It is universally applied in contract law. For example, in numerous contexts, contracts or transactions are lawful and valid only on condition that the payment of the price (usually money) in them occurs "hand to hand" at the time the contract is made. These contracts include the contract of currency exchange (*sarf*) and advance purchase (*salam*). In both cases, any money must be actually paid over, changing it, as I explain in my book on contract law, from *dayn* to *'ayn*.[12] Arising from such contexts is the linguistic usage of *'ayn* as meaning specific pieces of currency, such as actual coins, i.e., cash in hand. In many contracts then, if the money is not paid over at the time the contract is made, i.e., is not made *'ayn*, the resulting transaction is illegal and void. I have myself observed this rule applied in Saudi Arabian courts.[13]

30. In view of this, let us reconsider the crucial sentence from al-Buhuti on which Prof. Hallaq relies in claiming that enhanced damages are available in this case:

> If a usurper trades in a specific or concrete object [*'ayn*] that was usurped, or in the specific object [*'ayn*] of its price [i.e., after selling the object], in that he buys or sells and there appears a profit, or he buys with it something and there appears a profit, and that profit still exists [i.e., is present, unused], then the profit and the goods that the

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[11] Vogel, *Islamic Law and Finance*, 114-125.

[12] Ibid., 120.

[13] Frank E. Vogel, *Islamic Law and Legal System*, 154.

> usurper purchased—even if the purchase was made on credit with the intent to pay its price with the usurped property or with its price (after its sale) and he does so—belong to the owner of the usurped property and not their usurper.[14]

Note the role played by the term *'ayn*. To my eyes, schooled in the law of usury and risk, this specification stands out boldly, as it would in the eyes of any scholar of Islamic contract law and any Saudi judge. Its presence means that the money in question must be actual, segregated, concrete funds; indeed, literally it requires it to be concrete pieces of currency. I can appreciate why, given that *dayn* obligations are usually the vehicle for usury violations and given the Prophetic ban on transactions in them, this requirement that the money be *'ayn* appears. Moreover, there is the factor of the anomaly of enhanced damages within the larger framework of Hanbali law, to which an award of damages for the seizure or retention of money is unthinkable. The result is allowed here only because of the Hanbalis' characteristically stringent prosecution of the wrong of usurpation. To prevent the exception from getting out of hand, however, the scholars are careful to circumscribe the holding with limitations even besides the *'ayn* one I am discussing. These are mentioned in my second expert report.

31. The above shows why and to what degree this special allowance for damages for use of money does depend on a finding that the funds are traceable, concrete, and determined. The above also shows why the appearance of the term *'ayn* in the Buhuti passage is not a mere anomaly or archaism superseded by modern conditions.

2. Requirement to avoid speculation (*gharar*)

32. The need for concretely tracing claimed profits is all the more clear given the general opposition of Islamic and

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[14] al-Buhuti, *Sharh*, 2:422; see also idem, *Kashshaf*, 4:113; Ibn Qudama, *al-Mughni*, 5:416. The term in Ibn Qudama is *athman*, in context meaning "currencies," and yielding the same result as *'ayn*.

Saudi law to damages that are ascertainable only by means involving speculation, contingencies, uncertainties, or indeterminacy (*gharar*). The general rule is that damages are restricted to those that are actual, existent, concrete, and reliably quantifiable. This is the basis on which Saudi law denies recovery for lost profits in cases for contract breach, a very well-known characteristic of the Saudi legal system, nearly as prominent as that against the payment of usury including interest (*riba*).

3. Saudi judges' opposition to awarding damages on use of money

33. As my third and final consideration concerning Saudi law on enhanced damages, Saudi judges are, for many reasons of philosophy, policy, and ideology, as well as legal doctrine, opposed to awarding damages related to the loss of use of money. These reasons are elucidated in my book on the Saudi legal system.[15] The phenomenon is just as marked today as it was when my book was written. Saudi judges' opposition to awarding damages on delay in payment of money in any form is a well-known fact, noted also by Mr. Wolfson during his stay in Riyadh.

34. Therefore, Saudi judges will exercise any discretion they possess, whether as to facts or law, against giving damages on money judgments, even damages premised on disgorgement of profits gained from the use of money improperly taken or withheld.

35. Given the preceding three considerations, one may evaluate the correctness of the jury instruction actually given. In stating only that damages are allowed in the amount of "any profits you may determine SABIC derived by using in its operations the money," it fails to guide the jury as to the concrete tracing of profits that a Saudi judge,

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[15] Vogel, *Islamic Law and Legal System*, esp. 306-7, citing the example of Saudi judges' long battle against implicating their courts in any way in support of commercial banking, which they condemn because it deals in forbidden interest.

if he were ever to apply this exceptional doctrine given contemporary policies of the courts, would require. Moreover, it does not instruct the jury on how it might emulate the manner in which a Saudi judge would exercise his discretion against findings of enhanced damages.

C. Enhanced damages in usurpation are not allowable in this case, as a matter of Saudi law

36. The jury awarded enhanced damages in the full amount sought by ECAI and Yanbu. On the undisputed facts of this case, the profits to be disgorged did not meet either of the key requirements discussed as the first two considerations above. First, the profits were not concretely traceable. Indeed, the funds in question lost their character as *'ayn* when they were commingled with other money of SABIC.[16] Second, even assuming they could still be concretely traced after entering SABIC's general coffers, to claim that profits determined by the general profitability of SABIC as an entity over a period of many years are nonetheless the *actual profits* from this money is in contradiction to the letter and spirit of the numerous narrow restrictions Hanbali authorities place on the relevant doctrine. Finally, on the third consideration, the jury's liberal verdict counters observed trends in Saudi judicial practice, both as to the exercise of discretion to repel rulings that might resemble the award of interest, and as to lacking, in my knowledge, any precedent for such an award.

37. For these reasons, according once again to my perspective relying solely on Saudi law, the Court should have granted a motion for judgment as a matter of law finding

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[16] As I testified, I do not agree with the other experts that the rules allowing handling usurped goods that have been mixed with other like goods as constructively co-owned somehow mean that evident requirements as to traceability and non-speculation may be dispensed with. The relevant provision in al-Buhuti on its face only determines what property will be used to satisfy the obligation to restore the usurped goods. *Sharh*, 2:410.

that the evidence does not support an award of enhanced damages for usurpation.

III. The Court's rulings and jury instruction on contract interpretation and modification

A. The Court's guidance to the jury on interpretation of partnership contracts is flawed under Saudi law

38. The most relevant jury instruction (4.2) reads:

> In deciding [breach and resulting damages], you may consider clear evidence of what the parties intended in entering into the contract. You, the jury, must determine the meaning of the contracts, considering all the facts and circumstances relating to and reflecting the intent of the parties. Your purpose should be to find out from all of the credible evidence what the patties actually agreed upon.

Instructions 5.1 and 5.4 set out certain requirements for finding waiver. The Court denied SABIC's proposed jury instructions that refer to or reflect the conception in Saudi and Islamic law that partnership agreements are intrinsically prospectively voidable (*ja'iz*) contracts, while contracts for the conveyance of property, such as sales and leases, are intrinsically fully binding (*lazim*) contracts. The Court denied certain instructions as to modifications sought by SABIC, on the ground (as I understand it) that Section 18.2 (or 19.2) of the joint venture agreements requires any modifications to them to be signed by the partners SABIC and ECAI or Yanbu.

39. As to these matters I have two points I would like to make.

B. The distinction between *ja'iz* and *lazim* is an essential part of Saudi law governing the interpretation or implementation of partnership agreements

40. The distinction between *ja'iz* and *lazim* affects a Saudi judge's approach to a partnership contract throughout its life, both in interpreting its provisions and in governing its changes or evolution over time, such as through agreed

modifications. I have discussed the relevant points in my earlier reports, and refer here to them. But two consequences of the *ja'iz* and *lazim* distinction may be very briefly stated. One, a Saudi judge will incline, in the case of a *ja'iz* contract, against interpreting or enforcing one of its provisions in such a way so as to overrule, or diminish the significance of, the partners' later actual practice. Second, more particularly, a contract's character as *ja'iz* will incline a judge toward considering later contracts between the same parties, certainly *lazim* ones, as valid and binding according to their terms even if on their face they appear to conflict with terms of the earlier *ja'iz* agreement.

41. The chief point I wish to make here is that the distinction between *ja'iz* and *lazim* plays a role in Islamic contract law that cannot be ignored. Rather it is formative and pervasive in Hanbali contract law. That law declares many contracts intrinsically *ja'iz* partly or fully (including partnership, agency, loan, pledge, gift, etc.). Scholars writing on contract law remark on the distinction as fundamental and far-reaching,[17] as I do.[18] Character as *ja'iz* and *lazim* is considered so basic to contracts that the law declares it *jus cogens*, not open to alteration even by the parties' agreement. The distinction arises (as does the distinction between *'ayn* and *dayn*) as a consequence of underlying concerns to ward off prohibited usury (*riba*) and uncertainty (*gharar*).

C. It is an error under Saudi law to attach crucial significance to whether a modification was signed by the partners

42. This is for three reasons. First, in Islamic partnerships in general, given their *ja'iz* character, partners' ongoing modifications and continued consent to the terms of their relationship do not need to be formalized and may be

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[17] See, e.g., NJ Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (London: Graham & Trotman, 1984), 76-82.

[18] Vogel and Hayes, *Islamic Law and Finance*, 109-112; Vogel, "Contract Law of Islam." 120-122.

implicit. This is axiomatic given the premise of ongoing prospective flexibility of the contractual relationship. Thus, apart from any effect of Sections 18.2 (19.2), the joint ventures' signing the Unipol PE license, which could occur only with both partners' agreement, entails the partners' agreement also to whatever modification of the earlier joint venture agreement is implied by the license agreement. Second, the principle that *ja'iz* contracts are perennially and by their very nature subject to on-going change disinclines a judge to apply 18.2 (or 19.2) legalistically. Also, he would readily conclude that it was waived. Third and last, before the passage of modern companies statutes, Islamic law knew no artificial personality in companies. This indicates that the distinction between the partners as a group on the one hand and the partnership on the other hand will readily be overlooked by Saudi judges.

43. For these reasons the Court's conclusions denying SABIC's proposed instructions to the jury on Saudi law as to interpretation and modifications were erroneous as a matter of Saudi law.

/s/ Frank E Vogel
Frank E. Vogel

Sworn to before me this 4th day of April, 2003

APPENDIX S

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff/Counterclaim-Defendant,	)	
v.	)	C.A. No. 00C-07-161-JRJ
MOBILE YANBU PETRO-CHEMICAL COMPANY, INC., *et al.*,	)	
Defendants/Counterclaim-Plaintiffs.	)	

POST-TRIAL DECLARATION OF WAEL B. HALLAQ

Introduction

1. The purpose of this Declaration is to supplement my prior opinions, particularly in response to issues raised by Dr. Frank E. Vogel in the Affidavit of Frank E. Vogel Concerning Motions for Judgment As a Matter of Law, dated April 4, 2003 ("April 4, 2003 Vogel Report"). In addition to the materials described in my previous writings and testimony in this case, I have reviewed: (a) the April 4, 2003 Vogel Report; (b) the Report of the Independent Expert Herbert S. Wolfson, dated February 21, 2003 ("February 21, 2003 Wolfson Report"); (c) the Supplementary Report of the Independent Expert Herbert S. Wolfson, dated March 5, 2003 ("March 5, 2003 Wolfson Report"); (d) the deposition of Herbert W. Wolfson, taken March 6, 2003 ("Wolfson Dep."); and (e) portions of the Court's Jury Instructions. I also attended Dr. Vogel's deposition on December 9, 2002 ("Vogel

Dep.") and the entirety of the Court's Saudi law hearing conducted on March 7, 2003, and I have reviewed portions of the transcripts of these proceedings as they relate to my opinions.

2. In reviewing the April 4, 2003 Vogel Report, I find that most of the issues addressed therein are not new, but rather are a rehashing of issues previously addressed in his Affidavit of September 16, 2002 ("September 16, 2002 Vogel Report"), the Rebuttal Affidavit of Frank E. Vogel, dated October 22, 2002 ("October 22, 2002 Vogel Report", and/or the Vogel Dep. I therefore do not feel it necessary or appropriate to repeat my detailed responses to Dr. Vogel's opinions to the extent they were previously explained in the Expert Report of Wael B. Hallaq, dated September 12, 2002 ("September 12, 2002 Hallaq Report"), the Declaration of Wael B. Hallaq, dated September 13, 2002 ("September 13, 2002 Hallaq Declaration"), the Second Declaration of Wael B. Hallaq, dated October 16, 2002, in my December 6, 2002 deposition, or at the March 7, 2003 Saudi law hearing. Certain issues, however, require amplification or response, and I address these issues herein.

Dr. Vogel's Misconception of Usurpation

3. It has been a persistent argument of SABIC's counsel, guided by Dr. Vogel's own construction of Islamic legal principles, that the law of usurpation does not apply to the facts of this case. This argument does not, and cannot, hold for two simple reasons. First, the Hanbali/Saudi law of usurpation is more comprehensive than the coerced and restrictive notions that Dr. Vogel tried to impose on it. In due course (pars. 5-6 and 8, below), I show how his unjustifiably eclectic use of modern sources and his misinterpretation of Hanbali texts have led him to erroneous conclusions regarding what usurpation is. Second, Dr. Vogel's superficial understanding of the concept of usurpation has restricted his view of the concept's pervasiveness. Usurpation law in the *Sharia* at large, and in the Hanbali/Saudi tradition in particular, is ultimately a law of torts and damages. When the Hanbali and other Muslim jurists gave the definition of

usurpation a wide range of coverage, they did so for a good reason, namely, to allow victims to recover their due rights. But more importantly, the law of usurpation in all four Islamic legal schools, especially the Hanbali, was extended to cover instances and cases that do not fit Dr. Vogel's definition of usurpation or, strictly speaking, the jurists' own definitions. Even cases that do not include all the formal definitional elements of usurpation are nonetheless classified within the framework of usurpation since they result in the same damages. It should not be surprising therefore to find many such cases in the Chapter of Usurpation, which is an ever-present and extensive ingredient of every law book. If the concept of usurpation were to be confined to the extent Dr. Vogel proposes, there would be no adequate law of damages or torts in Islamic law, and—absurdly—the victims of wrongful conduct would be punished whereas the wrongdoers rewarded.

4. Dr. Vogel now raises several allegations as to my knowledge of Saudi and Islamic law (April 4, 2003 Vogel Report, par. 5), allegations that he apparently hopes will be accepted as true by an audience unaccustomed to dealing with Islamic law, namely, an American court of law. He cites the fact that I have not visited Saudi Arabia and that I have not been previously involved in a Saudi commercial case, as if these two considerations are any measure of an expert's knowledge of Islamic and Saudi law. That I have not been to Saudi Arabia is a fact of no relevance whatsoever to my expertise, as I will show momentarily. That I have never been involved in a Saudi commercial case is an equally irrelevant fact, since my knowledge of Saudi and Islamic law is backed by a quarter of a century of study and scholarly research. In other words, unlike some other experts, my knowledge of Islamic/Saudi law is not culled from episodic experiences in American law courts, but rather the result of a sustained jurisprudential study and research over many years. Furthermore, it will become clear in due course why "direct experience" in the Islamic/Saudi legal system is no prerequisite for knowledge of what the law is and how it applies to certain cases.

5. Dr. Vogel now strongly implies that the works I have used in my opinions are archaic, since, he says, they are "dating back at least several centuries" (April 4, 2003 Vogel Report, par. 5). Dr. Vogel chooses to ignore his own prior statements, including that: (a) Islamic law in Saudi Arabia "is drawn in principle from the Qur'an and the reported legal decisions of the Prophet Muhammad, but in day-to-day terms is known from scholarly texts, many written centuries ago yet possessing even today great influence"; (b) "the best means to known Saudi civil law on any issue is to learn the relevant rules and principles of the Hanbali school on that issue," (rules and principles that are found precisely in these scholarly texts); and (c) the "standard works considered authoritative in the courts of Saudi Arabia," especially "two works by Mansur al-Bahuti" (=Buhuti), "are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case." (September 16, 2002 Vogel Report, pars. 5, 7, and 8.) Now, without explanation, Dr. Vogel chooses to cast aside these authoritative texts and rely instead on "standard modern treatises" and "modern scholarly treatments" he has "perused," works that are not even Hanbali. (April 4, 2003 Vogel Report, pars. 5 and 16). A cursory look at my opinions, by contrast, reveals that they are based on an exhaustive study of the authoritative Hanbali works. It is to be noted moreover that the method I adopt is identical to that which any Saudi judge or jurist would follow and that Dr. Vogel himself originally declared to be the proper method.

6. There is a good reason why the Kingdom of Saudi Arabia has opted to employ these works as the jurisprudential foundation of its positive law. Unlike American law and jurisprudence, Islamic/Saudi law acknowledges neither precedent nor a doctrine of *stare decisis*, as both Dr. Vogel and Mr. Wolfson have acknowledged. (September 16, 2002 Vogel Report, par. 9; February 21, 2003 Wolfson Report, par. 10.) That is to say, Islamic law cannot be discovered from earlier decisions of the law courts. More than twelve hundred years of legal history shows this to be one of the most cardinal features of Islamic law. True, there have re-

cently been meager and half-hearted attempts to create a notion of precedent in the extra-judicial courts of the Board of Grievances, but these have thus far met with little success. Evidence of this is the utter failure to maintain published and systematic accounts of the Board's decisions. Furthermore, the *Sharia* courts—the default courts of the Kingdom—have not recognized any need for either keeping a record of cases or abiding in any manner by earlier decisions. It is therefore obvious, as has been the case for the past twelve hundred years, that knowledge of earlier cases is not required in order to discover what the law is. Visiting Saudi Arabia and observing how the courts work in that country will thus be a poor tool for unraveling the jurisprudential intricacies of what law should or should not apply to a particular case. Only one who has superficial knowledge of the inner workings of Islamic/Hanbali law would think otherwise. (For a thorough description and analysis of the structural, inner dynamics of Islamic law, see my book, *Authority, Continuity and Change in Islamic Law* [Cambridge: Cambridge University Press, 2001].)

7. Given the notorious absence of a record of court decisions in the Islamic/Saudi legal tradition, it is hardly surprising that Dr. Vogel has "never seen or heard of a usurpation case in a commercial context." (April 4, 2003 Vogel Report, par. 6.) In point of fact, Dr. Vogel testified at his deposition that he is "not aware of any decision" (not just in the commercial realm) "in which ghasb [usurpation] has ever been mentioned" (Vogel Dep. at p. 203); yet, Mr. Wolfson, after conducting only a few days of interviews in Saudi Arabia, learned that the only practicing Saudi lawyer he consulted was "handling a case that involved allegation of usurpation." (Wolfson Dep. at p. 21.) Thus, while Dr. Vogel's personal lack of knowledge is obviously no indication of the presence or absence of particular Islamic/Saudi legal practices, it remains true that it is virtually impossible to know for certain, or even with reasonable probability, what cases come or do not come before the Saudi courts. Before he abandoned his reliance on the authoritative Hanbali jurists—unjustifiable by any legal and academic standard—

even Dr. Vogel acknowledged that "with the exception of three volumes of decisions of the Board of Grievances published in the 1980s, court decisions in Sandi Arabia are not published or even open to public inspection." (September 16, 2002 Vogel Report, par. 9.) Nor would consulting Saudi judges or lawyers be a reliable method for determining the presence or absence of certain cases, since obviously no judge or lawyer can be said to have personal knowledge of the entire body of cases brought, and how they are decided.

8. At this juncture, and before proceeding to explain how—in the absence of precedent—law in the Saudi/Hanbali tradition is discovered or determined, it is important to note a major methodological problem in Dr. Vogel's approach. As referenced above, Dr. Vogel now heavily relies on modern works that have no bearing whatsoever upon the law of the Kingdom of Saudi Arabia. In fact, these modern works were written by Lebanese and Egyptian scholars who drew on the respective legal traditions of their countries, namely, the Hanafi and in part Shafi'i schools. These works, as any Islamic legal expert knows, are acknowledged as neither standard nor authoritative in the Kingdom of Saudi Arabia, a country that adheres through and through to the Hanbali school. Indeed, Dr. Vogel and Mr. Wolfson both agree that the Hanbali school predominates in Saudi Arabia. (March 7, 2003 Vogel Testimony at pp. 119-20, 125; February 21, 2003 Wolfson Report, par. 13; Wolfson Dep. at p. 46.) Nevertheless, in insisting that usurpation requires force and notoriety, Dr. Vogel found it convenient to invoke the Hanafi definition in a Hanbali country, which is just as inappropriate as it would be for an American court, in a case governed by American law, to ignore well-established American law in favor of say, the law of France. After further study of the authoritative Hanbali legal works. Mr. Wolfson also agreed that neither force nor notoriety is a required element in the Hanbali law of usurpation. This is a conclusion thoroughly supported by the entire legal tradition of Saudi Arabia. Dr. Vogel, however, still deems it correct to rely on irrelevant works, with the result that his theory yielded a hodgepodge legal formulation that would be acceptable to none of

the Islamic legal traditions. And his legal formulation includes rigid requirements that are not only contrary to the Hanbali authorities in their substance, but seem at odds in their rigidity with his own testimony that usurpation "involves a range of possibilities." (March 7, 2003 Vogel Testimony at p. 127.)

9. I have already noted that in the Islamic/Saudi legal system, a judge does not, and cannot, find the law in earlier court decisions. Instead, as Dr. Vogel and Mr. Wolfson both agreed (March 7, 2003 Vogel Testimony at pp. 117-19, 124-25; February 21, 2003 Wolfson Report, pars. 17 and 23), he finds it by means of exercising his own *ijtihad*, namely, his utmost legal, interpretive faculties based on the authoritative legal texts of his school. Instead of looking for past cases, a Muslim judge would search in the authoritative juristic works for the most relevant principle that governs a set of facts, guided by his understanding of relevant instructions in the *Quran* and the *Sunna* of the Prophet. This explains the variety of legal rulings governing one and the same case, a variety for which Islamic law is well-known. What a judge looks for is the most authoritative and "correct" law for the unique facts at hand. This he does with a view to doing the right thing, *i.e.*, doing justice in light of the guiding letter and spirit of the law. Predictability of decision-making is not a consideration in reaching a result in a particular case. The same case, in other words, may be decided differently by different judges since *ijtihad* has long been recognized as a highly individualistic activity and a subjective process, to boot. "Every *mujtahid* [he who exercises *ijtihad*] is correct," a highly acclaimed maxim pronounces. This much is amply recognized by all scholars in the field. (*See* Hallaq, *Authority*, p. 125; Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*," *American Journal of Comparative Law*, 26 (1978), at pp. 199-212.) For this reason, once a trial court exercises *ijtihad*, and the final decision is rendered, an appellate court (which is atypical in the Islamic tradition) is very reluctant to disturb that decision and will accord it tremendous deference, as Dr. Vo-

gel has himself acknowledged. (March 7, 2003 Vogel Testimony at pp. 117, 119.)

10. By the same reason that a Saudi/*Sharia* judge will not be guided by earlier court decisions, there is little point in attempting to predict how a judge might decide a case by observing the manner in which the courts operate in the Kingdom of Saudi Arabia. It follows therefore that—unlike the *modus operandi* of American law—"direct experience of Islamic law as it is actually applied in Saudi Arabia" (April 4, 2003 Vogel Report, par. 5) is by no means a prerequisite for a determination of what the law is or how it might be applied in a particular case. Instead, and as any competent judge or jurist would insist on, it is the juristic works which constitute the legal subject matter for the judge's deliberations. This also explains why Islamic law is widely and unqualifiedly characterized as "jurists' law." (*See* Joseph Schacht, *Introduction to Islamic Law* [Oxford: Clarendon Press, 1964], pp. 209 et seq.; Hallaq, *Authority*, p. 125.) And it is precisely in the works of jurists—and not in court decisions—that the judge would find the law. Here, Dr. Vogel chose to ignore one of the most striking and well-known phenomena of Islamic legal practice, namely, that judges, when faced with hard cases, would often write to jurisconsults (the acknowledged experts of the law) in faraway lands (but from the same school of Islamic law) for a solution to the case. Thus an Egyptian judge applying the rules of the Maliki school would, for example, seek a solution from a Moroccan jurisconsult (necessarily from the Maliki school) who might have never set a foot in Egypt. Modern scholars of Islamic law are intimately familiar with, and readily acknowledge the pervasiveness of, this phenomenon.

11. Furthermore, judging by a prior experience in this case, Dr. Vogel's empirical method of observation of alleged legal practices in the Kingdom of Saudi Arabia has met with complete failure. Note for example his reliance on the field experience of Mr. al-Zubair who, by Dr. Vogel's own admission, counseled him on a host of issues related to this case, including the matter of the statute of limitations. (March 7,

2003 Vogel Testimony at pp. 109-10, 114, 116-17.) I have been advised that SABIC withdrew Mr. al-Zubair's opinion on the latter after concluding that it was incorrect, and I was present at the March 7, 2003 Saudi law hearing when Dr. Vogel was compelled to admit that his confidence in Mr. al-Zubair had "to some degree" been "shaken." (March 7, 2003 Vogel Testimony at pp. 123-24.) Thus, it is clear that "direct experience of Islamic law as it is actually applied in Saudi Arabia" (April 4, 2003 Vogel Report, par. 5) has already yielded a manifestly erroneous conclusion in this case, a conclusion that illustrates merely one instance of how the alleged "direct experience" can be fatally misleading.

Ownership of Usurped Property and
Right to Bring Usurpation Claim

12. Dr. Vogel claims that "[i]n the case before us, the owner of the property allegedly usurped is not either ECAI and Yanbu [sic], but the joint ventures themselves." (April, 4, 2003 Vogel Report, par. 12). This conclusion is remarkably inconsistent with Dr. Vogel's own admissions that: (a) KEMYA and YANPET in this case are "'*inan*" (jointly funded) partnerships, where "capital is contributed by all partners and held *in joint*" (my emphasis); and (b) "the distinction between the partners as a group on the one hand and the partnership on the other hand will readily be overlooked by Saudi judges." (April 4, 2003 Vogel Report, footnote 2, and par. 42.) Under Islamic law, the assets of the *'inan* partnerships in this case belong equally to ExxonMobil and SABIC, and property taken wrongfully from the joint ventures was taken wrongfully from ExxonMobil in proportion to its half interest in the partnership. This is especially the case given that ExxonMobil and SABIC, rather than the joint ventures as separate legal entities, are the signatories to the Joint Venture Agreements, which include the contractual provisions of Articles 6.3.

13. The last sentence of par. 12 of the April 4, 2003 Vogel Report is not only incoherent but severely misrepresents well-known facts about Islamic/Hanbali law. I fail to see why "a claim by one partner against another" cannot be "a

claim for usurpation." If anything, the Islamic legal literature is replete with cases of usurpation between partners. In fact, a significant bulk of the legal literature pertaining to usurpation treats precisely situations where usurpation is between and among partners, since partnerships are deemed in Islamic law to be a context in which cases of usurpation are very likely to arise. The *fatwa* literature, where the body of authoritative juristic doctrine is to be found, abounds with detailed discussions of usurpation within the context of partnerships. (*See*, for example, Ibn Hajar al-Haytami, *al-Fatawa al-Kubra al-Fiqhiyya* (Beirut, n.d.), vol. 3, p. 94 [two cases]; *al-Fatawa al-Hindiyya*, (Beirut, 1980), vol. 5, p. 144 [two cases], 160).

Propriety of Court's Determination
of Elements of Usurpation

14. In light of the above, I have reviewed Jury Instruction 4.4 (Elements of Usurpation) to determine whether in my view it comports with my opinions as to what is required to demonstrate usurpation. While I believe, as I have previously opined, that usurpation is defined in the authoritative Hanbali works with far less restriction than the Court found, I also believe that Jury Instruction 4.4 reflects a valid exercise of *ijtihad*, or the Court's discretion to find the law applicable to this applicable set of facts. Dr. Vogel's criticism of Jury Instruction 4.4 fails to recognize either: (a) the Hanbali sources I have previously cited; or (b) the Court's role in determining law under the principles of *ijtihad*.[1]

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[1] Even if the facts of the present case did not justify the application of the law of usurpation—a proposition that would in my considered opinion be utterly mistaken—ExxonMobil's alleged facts would still fall under the general rubric of usurpation, since these facts do lead to the same remedial damages. Note, for example, that the famous Hanbali jurist Buhuti, in his expansive work *Kashshaf* allots about 60 pages to the Chapter of Usurpation; of these, 19 (nearly one third) are dedicated to cases that even Buhuti suggests are not within the classic definition of usurpation but which nevertheless qualify for the same damages. (Buhuti, *Kashshaf*, vol. 4, pp. 113 et seq.) Likewise, in other schools, even cases of bodily harm and property destruction which require the same type of damages

Relevance of Traceability of Usurped Money

15. To the extent Dr. Vogel attempts to argue that usurped money must necessarily be "actual, segregated, concrete funds" or "concrete pieces of currency" (April 4, 2003 Vogel Report, par. 30), he is certainly mistaken. Indeed, his current discourse on the supposed requirement of traceability is nothing more than a restatement of his prior opinion on the subject (October 22, 2002 Vogel Report, pars. 16-19.) He now simply adds that the use of the word *'ayn* in an isolated quotation from Buhuti supports his position. As I explain below, that supposition is based on a flawed understanding of the cited passage from Buhuti. More fundamentally, Dr. Vogel overlooks an undeniable feature of Hanbali and Saudi law, namely, that commingling gives rise to a constructive partnership (a feature amply documented in the September 12, 2002 Hallaq Report, par. 17). It is precisely because the money ceases to be segregated and concrete once it is commingled that Hanbali law insists on constructing such a partnership. Furthermore, and to put it differently, if the money were to be traceable as concrete pieces of currency, then there would be no need to create, or even acknowledge the existence of, a constructive partnership. Conversely, a constructive partnership in usurpation is instituted precisely for the purpose of dealing with a situation in which commingling renders the separation of properties (including monies) impossible. Mr. Wolfson agreed that Dr. Vogel had "mistakenly characterize[d] Hanbali legal scholarship" on this point, since Hanbali law provides for "a con-

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are included under the Chapter of Usurpation. (See, *e.g.*, *al-Fatawa al-Bazzaziyya*, vol. 6, pp. 184 et seq., in the Chapter of Usurpation, vol. 6, pp. 167-95.) Again, it is my fervent belief that this case does fit within the Hanbali definition of usurpation, but the point here is simply that the damages available to ExxonMobil in this case would be the same even if the Court were to adopt Dr. Vogel's incorrect view. I understand Mr. Wolfson's opinion to be the same as mine in this regard, where he opined that the debate over the elements may not "make[] any substantive difference in terms of the aggrieved party's right to restitution." (February 21, 2003 Wolfson Report, paragraph 55; also at paragraph 62.)

structive-partnership in the commingled assets," (March 5, 2003 Wolfson Report, par. 34), and by definition there can be no tracing where the assets are commingled. The acknowledged impossibility to trace the *'ayn* or "concrete pieces of currency" usurped, is the very reason for valuing one's share of commingled money in non-concrete, symbolic terms, which automatically becomes treated as a proportion of the usurper's total assets. This was precisely the legal basis for the Court's Jury Instruction 6.4 (Damages for Usurpation), which I have reviewed, and which I believe to be an absolutely correct statement of the pertinent Saudi/Hanbali law.

16. As noted above, Dr. Vogel's argument rests almost entirely on a quotation from Buhuti, namely:

> If a usurper trades in a specific or concrete object ['*ayn*] that was usurped, or in the specific object ['*ayn*] of its price [i.e., after selling the object], in that he buys or sells and there appears a profit, or he buys with it something and there appears a profit, and that profit still exists [i.e., is present, unused], then the profit and the goods that the usurper purchased—even if the purchase was made on credit with the intent to pay its price with the usurped property or with its price (after its sale) and he does so—belong to the owner of the usurped property and not their usurper.

(Buhuti, *Sharh*, Vol. 2, p. 422, as quoted in April 4, 2003 Vogel Report, par. 30.) Dr. Vogel states that this was "the crucial sentence" on which I relied in formulating my opinion that ExxonMobil could recover damages based on profits earned with the usurped money by SABIC, misleadingly suggesting that it is the centerpiece of my evidence. However, it was Dr. Vogel, not I, who highlighted (with his own translation) this particular quotation. (October 22, 2002 Vogel Report, par. 16.) I simply included this citation among *many* Hanbali texts that I cited in support of my opinion about the available damages (September 12, 2002 Hallaq

Report, pars. 16-17), and Dr. Vogel nowhere addresses the numerous other sources.[2]

17. Although Dr. Vogel's opinion is circuitous and convoluted, I believe that his reliance on the quoted passage from Buhuti is simply another way of arguing that usurped money must be concrete and traceable in order to give rise to the damages for usurpation I have described previously in detail. What he fails to take into account, however, is that the very same paragraph from Buhuti indicates that the usurper can recover usurpation damages even if the property is converted from *'ayn* (specific) to *dayn* (abstract). The language from Buhuti, as translated by Dr. Vogel himself, makes this abundantly clear: "even if the purchase was made *on credit* with the intent to pay its price with the usurped property or *with its price (after its sale).*" (My emphasis; Buhuti, *Sharh*, vol. 2, p. 422, as quoted in April 4, 2003 Vogel Report, par. 30.) By definition, Buhuti's reference to the underlined terms, which are *dayn*, not *'ayn* demonstrates the utter fallacy of Dr. Vogel's position, namely, that traceability is required. Such a conversion from *'ayn* to *dayn* does not, according to the very same passage from Buhuti, prevent the resulting property from "belong[ing] to the owner of the usurped property and not their usurper." (Buhuti, *Sharh*, vol. 2, p. 422, as quoted in April 4, 2003 Vogel Report, par. 30.)

18. Furthermore, in his longer work *Kashshaf*, vol. 4, 110, Buhuti elaborates further on what he meant by the expression "on credit" *in this very passage.* He approvingly quotes Ibn Rajab—one of the authoritative jurists whose work is considered canonical in today's Saudi Arabia—to the effect that coins (currency; Arabic: *nuqud*) cannot be deemed concrete or specific (*al-nuqud la tata'ayyan bil-ta'yin*). In other words, money is not necessarily tangible,

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[2] Throughout his report, Dr. Vogel characterizes such damages as "enhanced damages." To the extent he intends this expression to suggest that such damages are an artificial enhancement or a functional equivalent of prohibited interest, I strongly disagree, as I fully discuss below.

actual (*'ayn*) but rather abstract and symbolic (*dayn*). This understanding of the concept of money is supported by the Islamic law of debts and loans, where the debtor's payment to the creditor need not be the same money or coins borrowed. (Buhuti, *Kashshaf*, vol. 3, p. 351; also vol. 4, p. 92.) Put differently, the coins and currency need not be traced as a concrete and actual entity. "On credit," therefore, means "owing the value of money" but not the money itself, as a physical, segregated, concrete and unique substance. But most importantly, money in Islamic juristic eyes is plainly an abstract, symbolic entity.

19. Nowhere in Hanbali and Saūdi legal writings is there a mention, however passing, of a requirement that the usurped money be actual, segregated or concrete pieces of currency in order to recover the damages that I have explained previously. If Dr. Vogel's allegations in this respect were true, one would find these requirements unequivocally stipulated, for they would obviously be crucial to the law of damages and torts.

Damages for SABIC's Profits on Usurped Money
Do Not Amount to Prohibited Interest

20. While it is true that Islamic law does not allow recovery of interest, it would be a grave mistake to conflate interest with profits generated through what Islamic law generally terms trade (*tijara*). This erroneous conflation is the hallmark of Dr. Vogel's arguments. His attempt to equate the profits that SABIC generated on the usurped amounts with interest is at best a rhetorical ploy that finds no support whatsoever in Hanbali and Saudi law. This law sharply distinguishes between the two forms of investment and furthermore duly allows for recovery of all actual profits made on the principal usurped. This remains true, as we have seen, even if the money cannot be identified in concrete terms, *i.e.*, as specific coins or actual pieces of currency.

21. Dr. Vogel's unduly restrictive constructions have produced results contrary to both the letter and spirit of Islamic/Saudi law. In his bid to regulate the case in question

exclusively by the rules of interest, he has in effect sacrificed the most sacred *Sharia* laws of protecting property rights against wrongful conduct. Simply stated, if undue restrictions are placed on the right to recover the value of profits generated from a usurped principal (on the grounds that the latter is not concrete and segregated and thus potentially involved in speculation and interest-earning), then nearly no property right under the law of usurpation would be restorable. In fact, if Dr. Vogel's theory were true, then there would be virtually no reason for the law of usurpation to exist. However, it is a widely acknowledged fact that the law of usurpation in Islamic law is one of the most elaborate, occupying a significant space in the authoritative legal manuals. Moreover, under Dr. Vogel's excessively restrictive theory, the wrongdoer ends up reaping the profits of his wrongdoing, while, on the other hand, the victim is made to suffer doubly: first, by the very fact of being subject to the wrongful act of usurpation, and, second, by losing any right to recover profits made on what is in the first place his/her own property. Thus, Dr. Vogel's convoluted conclusion runs against the fundamental principles of property rights, as well as against the Prophetic maxims that acquired a sanctified status in Hanbali/Saudi law. To mention only one of these sacred maxims, "the sweat of a wrongdoer shall never be rewarded." (Buhuti, *Kashshaf*, vol. 4, pp. 80-81; for other relevant maxims, see September 13, 2002 Hallaq Declaration, par. 9.) Dr. Vogel himself acknowledged at the Saudi law hearing, when confronted with an opinion he gave in another matter, that a bad-faith breach of contract could "easily lead" a Saudi court "to augment the quantum of damages awarded to the plaintiff," and this "quantum of damages need only be shown to a reasonable degree of certainty." (March 7, 2003 Vogel Testimony at pp. 152-53, 156.)

Clarification of Claims Available to ExxonMobil in this Case Under Saudi Law

22. I wish also to clarify that in reaching my opinions about the applicability of usurpation to the facts of this case, I did not intend in any fashion to undermine the equally ap-

plicable claims for breach of contract and breach of fiduciary duty (damages caused by *khiyana*). It is my view that both of the latter claims would be available to ExxonMobil under Islamic law given the facts as alleged, and Dr. Vogel does not disagree. (September 16, 2002 Vogel Report, par. 32.) In addition to such claims, the fact that property was taken also makes this case one where a claim for usurpation is appropriate.

/s/ _____
Wael B. Hallaq

April 24, 2003
Date

APPENDIX T

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION	)	
Plaintiff,	)	Judge Jurden
v.	)	Civil Action No. 00C-07-161 JRJ
MOBILE YANBU PETRO-CHEMICAL COMPANY, INC., -and- EXXON CHEMICAL ARABIA, INC.,	)	
Defendants.	)	
CITY of CAMBRIDGE	)	
	:ss.:	
STATE of MASSACHUSETTS	)	

REBUTTAL AFFIDAVIT OF FRANK E. VOGEL CONCERNING MOTIONS FOR JUDGMENT AS A MATTER OF LAW

FRANK E. VOGEL, being duly sworn, does hereby depose and state as follows:

1. I have received a copy of both ExxonMobil's briefs in opposition to SABIC's renewed motion for judgment as a matter of law, and the accompanying Post-Trial Declaration of Wael B. Hallaq. These filings raise several new points about Saudi law and about my views earlier expressed, and I have been asked to respond to these.

Ijtihad and Discretion to Re-Interpret Saudi Law

2. In ExxonMobil's recent brief and in Prof. Hallaq's opinion, it is now suggested that, if Prof. Hallaq's version of usurpation law does indeed differ from the Hanbali jurisprudence and Saudi practice as I point out, the verdict should still be upheld as a valid exercise of *ijtihad*, a power possessed by the Saudi judge.

3. *Ijtihad* in Saudi Arabia is one of the major subjects of my research in Saudi Arabia and my resulting book. As I noted in that book, based on years of research in Saudi Arabia, Saudi judges only rarely practice *ijtihad*—in the sense of crafting new or unprecedented opinions. Moreover, I never observed them deciding according to what seems equitable to them while disregarding what is written in the Hanbali books. No one anticipates that Saudi judicial *ijtihad* will overrule, or revise, the fundamental legal conceptions or institutions of the old Islamic law, ones which fundamentally shape the jurisprudence, even on a case by case basis. Yet Prof. Hallaq expects the Delaware judge to redefine basic principles or norms of the Saudi Arabian legal system, such as the basic notion of usurpation, or the fundamental scheme for compensating breaches of contract or losses caused to property, and the like.

4. In Saudi Arabia, the "*ijtihad*" of the judge refers usually to one of the following:

    1) The judges' pious effort to gain personal conviction that the particular Hanbali or other standard rule they apply is well-founded in the revealed sources.

    2) A jurisprudential principle requiring the state to respect the independence and freedom of judges and jurists.

    3) The judges' discretion in determining facts (fact-finding).

    4) The qualified judges' freedom to choose among various alternative views of the Hanbali school noted in the books (Hanbali sources ordinarily re-

cord alternative Hanbali positions on a posited legal question).

5) Reputedly to choose the rule of another school of Sunni law other than a Hanbali one (I have not ever observed this done explicitly).

Notably, none of these generates wholly unprecedented views, and three of them operate only as ideological underpinnings for applying the standard views.

5. If a judge were to attempt to revise a basic, commonly held conception of Islamic law, such as to rule following a theory that usurpation is now a standard tool for remedying pecuniary losses arising from breach of contract or tort generally, then his judgment would likely be reversed on appeal as an unsound or improper *ijtihad* on the ground that it offends either points of law on which all past Sunni scholars are reported to have been in agreement or a basic principle (*qa'ida*) of Islamic law.[1]

6. *Ijtihad* has prerequisites. The prerequisites for—and the tools for doing—*ijtihad* include: knowledge of the Qur'an as to legal matters, including what verses abrogate others, which are unambiguous, etc.; awareness of the sayings (*hadiths*) of the Prophet Muhammad with legal relevance and how to evaluate their authenticity; and profound knowledge of the inner workings of the system of rules and the views of scholars of the past, such as to know which are held to what degree of unanimity, which reinforce others or are distinguishable from others, what basic principles (*qawa'id*) ought to be deduced from them or are laid down by them, etc. Moreover, requirements of religious piety and personal character apply, including that one is a Muslim who obeys the requirements of the law in his personal behavior (does not commit certain sins, etc.). Lists of the qualifications of one qualified to perform *ijtihad* (*mujta-*

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[1] See Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Boston: Brill, 2000), 105-107, 135.

hid) appear in works of *usul al-fiqh*.[2] Saudi judges customarily refrain from departing even from the views of the Hanbali school.[3] In effect, an *ijtihad* deviating substantially from the basic trend and pattern of existing Islamic legal rules and principles appears only very rarely, and demands for it to be credited at all an authority possessed only by the most able and learned of Saudi judges and scholars. When new rules emerge in Saudi Arabia, it is usually under the compulsion of events, such as an important change in customs or habits or the emergence of a vital new legal conception or problem.[4] Moreover, even then, a Saudi court advances firmly within the framework of basic Islamic legal principles (*qawa'id*), by close analogies to existing Hanbali legal rules and concepts, and according to prevailing judicial doctrinal trends and institutional policies.

7. Despite the onerous prerequisites of knowledge and status for performing *ijtihad*, Prof. Hallaq not only considers himself capable of performing an unprecedented *ijtihad* altering the basic Hanbali law on a subject, but he encourages the Delaware Court to do the same. Again, any such *ijtihad* in Saudi Arabia would be extremely rare, akin to a US court overruling a settled principle of its jurisprudence and that decision being upheld on appeal. Further, such an *ijtihad* requires for its credibility qualifications which, on the very face of things, neither Prof. Hallaq, myself or, with respect, any US court possesses.

8. Even if the Court were to exercise *ijtihad*, in seeking to apply the law as it exists in the Saudi Arabian legal sys-

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[2] See Ibn Qudama, *al-Mughni*, 11:380; ____, *Rawdat al-nazir* (Riyadh, 1984), 401-409. See Vogel, *Islamic Law and Legal System*, 62 and n. 55; M. Kamali, *Principles of Islamic Jurisprudence* (Cambridge, UK: Islamic Texts Society, 1991), 374-77; Hallaq, *A History of Islamic Legal Theories* (Cambridge, UK: Cambridge University Press, 1997), 117-118.

[3] Vogel, *Islamic Law and Legal System*, 125-26.

[4] See, e.g., Vogel, *Islamic Law and Legal System*, 125-129.

tem, it is essential to strive to predict what the Saudi legal system would actually routinely do with a particular set of facts and legal claims, rather than propound unprecedented rules, a step that would only rarely be taken in Saudi Arabia itself.

9. As noted, I am aware of no view in the Hanbali school, or in any other of the Sunni schools, that agrees with Prof. Hallaq's breathtakingly wide idea of usurpation, or with the scope of damage awards he believes can accompany such usurpation.[5] Hence it is extremely unlikely that any Saudi judge would agree with Prof. Hallaq's definition of the tort and its purposes as a result of his "*ijtihad.*" If he did, I expect that he would be reversed, despite the leniency of appellate standards of review in Saudi Arabia, on the ground that his decision offended either an opinion as to which the appeals court "knows no difference of opinion" or a basic inductive principle of the relevant bodies of doctrine (*qa'ida*).[6]

The Sources of Law in the Saudi System

10. Prof. Hallaq claims that, since court decisions are not a formal source of law in Saudi Arabia, he is under no obligation to attempt to know Islamic law as it is currently applied in Saudi Arabia. He wishes to take the law *solely* from books that are at least two hundred years old, without even seeking to know (a) whether the law as Saudi jurists understand and apply it agrees with his conclusions; and (b) whether any change has been introduced into Hanbali law as applied in Saudi Arabia. He does not use the Hanbali books as evidence of the *current* practice of Saudi Arabia, as I do. Instead he declares that Saudi law can be no other than the law of the old books, and if current Saudi practice differs from

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[5] Problems with Prof. Hallaq's views on these points are covered in my earlier opinions, and further explained in ¶¶ 15-26 below.

[6] Vogel, *Islamic Law and Legal System*, 103-107.

those books, then the latter control.[7] Prof. Hallaq is certainly aware that Islamic law, including Islamic law in Saudi Arabia, is a juristic legal system. Then it is curious that he ignores the possibility that Saudi jurists will continue to introduce nuance into the system over time. The jurists of Saudi Arabia do continue to evolve Islamic law as applied in the country. What Prof. Hallaq ignores is that many of the most influential jurists in Saudi Arabia are judges, and that judges form the greater part of the highly trained jurists of Saudi Arabia. As jurists they demonstrate their views in their decisions. Therefore Prof. Hallaq's distinction between court decisions and juristic writings is entirely beside the point. I do not point to the court decisions as binding precedents. Rather I point to them as evidence of ongoing juristic opinion in Saudi Arabia—how law is understood as well as applied by the jurist-judges, all of whom consult among themselves and with their senior jurists and *muftis* (i.e., scholars issuing authoritative legal opinions, many of them holding official positions).

11. Prof. Hallaq claims that his books explain how Islamic law can change and evolve over time. This arouses a question: how can he embrace the principle that Islamic law changes and evolves and simultaneously exempt Islamic law in Saudi Arabia from any evolution?

12. Prof. Hallaq's arguments imply a view that Saudi law has no coherence or consistency, or capacity for change or evolution, at all. It consists only of Hanbali law from the old books, plus perhaps a free-wheeling unconstrained equitable *ijtihad* that itself results in no lasting evolution of the old law. Hence he can detect no ground on which contemporary Saudi law or practice could have relevance to his decisions. My book on Saudi Arabia, in multiple ways, reveals how entirely flawed such a notion of Saudi Arabian law and its evolution is.

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[7] Saudi Law Hearing (Hallaq), 30-33.

13. Moreover, Prof. Hallaq's notions of Saudi law entirely neglect the fiqh law's interaction with statutes issued by the ruler and other rapidly changing facts about law in Saudi Arabia (such as new forms of banking, security, commerce, etc.), which can impact legal doctrine even in purely contingent ways and have spurred lasting changes in doctrine.[8]

14. Prof. Hallaq's idea of usurpation would, if correct, be utterly basic to understanding damages in contract and tort under Saudi law. Yet he argues that, even should it be shown that for decades if not centuries Saudi judges have failed to apply such a doctrine as he proposes, a US court should not hesitate to apply it today since it remains the correct view even if no Saudi judge has acknowledged it.[9] This is to make an absurdity of the very notion of Saudi law as Prof. Hallaq understands it. As I observed, Saudi Islamic law is daily applied with an intellectual consistency scrupulously maintained by its scholarly keepers, including its judges and appellate courts.[10] For these jurist-judges to have overlooked so a fundamental doctrine for so many decades, while Prof. Hallaq alone has been able to discover it, is not possible.

Anomalies Brought About by Hallaq's Conception of Usurpation

15. As does Prof. Hallaq, I wish to rely on my prior affidavits and testimony on the nature of the Hanbali and Saudi law of usurpation. Instead of responding to Prof. Hallaq's latest Declaration largely by reproducing earlier statements, I think it will be more useful to review Prof. Hallaq's positions from another perspective—by pointing out certain additional anomalies that would obtain were his views correct. These anomalies are not

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[8] Vogel, *Islamic Law and Legal System*, 125-129, Chapter VI.

[9] Saudi Law Hearing (Hallaq), 30-31.

[10] Vogel, *Islamic Law and Legal System*, Chapters III, IV, and VI, and passim.

trivial in their significance but implicate fundamental Hanbali and Islamic laws and principles and generally accepted positions of Islamic law scholars. I discuss four sets of anomalies. The first and third concern how to reconcile stark contradictions between the consequences of Prof. Hallaq's views on usurpation and certain well-known observations about Islamic contract and damages law. The second anomaly points out a large unaccounted-for conceptual overlap in Prof. Hallaq's account between two torts (and two damage measures) that are distinct in both Islamic and Saudi law. The last anomaly concerns apparent unresolved issues, implausibilities, and unintended consequences stemming from Prof. Hallaq's definitions of usurpation.

16. As a first anomaly, we may note that, were Prof. Hallaq's views correct, then some of the most famous doctrines of the Islamic contract and tort law of damages would become anomalous to the point of incomprehensibility. As a prime example, it is a commonplace of modern discussions of the topic of tort and contract damages, with regard to all the four Sunni schools of law, to point out how profits or gains a plaintiff lost because of the defendant's wrongdoing, i.e., what we term "lost profits" and part of "consequential damages," are unrecoverable. (I attach Appendix A including a number of quotations from such discussions.)

17. In such discussions, sometimes mention is made of the tort of usurpation. But it is mentioned precisely to contrast the damages this particular tort allows with those available in the ordinary tort or contract case. (As discussed below, the ordinary case allows for recovery for lost property under the heading of "destruction" (*itlaf*) and transgression of duty of care (*ta'addi*), not usurpation (*ghasb*).) It is specifically recognized that usurpation law allows the victim, in a manner strongly contrasting with the ordinary case, to recover the putative use-value or usufruct of the property (usually equaling the fair rental value) lost during the time of the usurpa-

tion,[11] and even, under certain circumstances, recover for the *wrongdoer's* actual profits if these can be known.[12] But all of this is understood to occur only when the well-known requisites of the tort of usurpation are met in the specific case,[13] a possibility that is considered remote from the normal situation.

18. I bring this all up to point out how unprecedented and unknown Prof. Hallaq's view of usurpation is. He has defined the tort of usurpation as not really a distinct tort at all, but as a central tenet of the general law of damages in tort and contract. If his view were correct, then in the run-of-the-mill contract or tort case, though the victim would not recover his own lost profits, one could regain the actual profits the wrongdoer reaped from his use of the victim's property, and be compensated also or instead by the use-value one was deprived of by the usurpation. How then would it be possible for scholars, in the course of their discussions of the strict, narrow limitations on Islamic damages in tort and contract, to fail to mention Prof. Hallaq's position?[14] Yet one never hears of it.

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[11] See, e.g., al-Mardawi, *al-Insaf*, 6:201. This assumes that the property possesses usufructs, i.e., it is not a consumable (such as money), and that it actually exists.

[12] See S. Mahmassani, "Transactions in the Shari`a," in Majid Khadduri and Herbert J. Liebesney, eds. *Law in the Middle East* (Washington, DC: Middle East Institute, 1955), chapter VII, 188-191, discussing such damages only as to usurpation ("wrongful appropriation," *ghasb*), while denying them as to the basic form of recovery for lost value, namely "destruction of property" (*itlaf*). For reasons discussed in my other affidavits, usurpation does not allow as a general rule recovery for profits on trade in money usurped (the exception being only as to precisely and concretely traceable proceeds of that money, a rarely existing situation).

[13] See for example id., and also Mahmassani, Appendix B, "*ghasb* for the rest of the schools is the seizure of the right of the other by aggression (*'udwanan*)."

[14] Again, Appendix A offers representative quotations.

19. Reinforcing this very anomaly is my own experience in Saudi Arabia. As mentioned before, despite twenty-three years of involvement with the system, I have never encountered a case where Prof. Hallaq's standard of enhanced damages has been applied (nor for that matter have I even heard of a commercial case where usurpation law, whether on Prof. Hallaq's account or any other, has been applied). Yet, if Prof. Hallaq's account of usurpation damages were sound, it would demand an everyday application.

20. A second anomaly about Prof. Hallaq's position is how he explains the relationship between usurpation as he understands it, on the one hand, and the doctrine of "destruction" or *itlaf*, on the other. As I have uniformly observed throughout my twenty-three years of interactions with Saudi judges, lawyers and Saudi and Hanbali legal sources, as I have written in my work on Islamic contract law, and as is universally recognized by all scholars of the Islamic law of obligations I am aware of, it is the latter doctrine that in fact performs the role Prof. Hallaq assigns to usurpation. This doctrine does not apply only in cases of actual destruction, but provides the basis for recovery of actual, out-of-pocket pecuniary losses in both contract and tort. As Prof. Mahmassani states,

> In Islamic law, every injurious act wrongfully committed against the property of others makes the aggressor liable. This principle, which was especially applied to the destruction of property, was gradually broadened by the jurists to include all injuries, whether to property or persons, so that every injury was called "destruction." This culminated in the emergence of a comprehensive theory of liability and its causes and conditions, based upon

general legal maxims and embracing most illegal acts.[15]

21. A crucial distinction between usurpation (*ghasb*) and destruction (*itlaf*) is that the latter allows compensation solely for the exact value or equivalent of the actual property lost, a limitation on damages that is demonstrated every day in Saudi Arabian legal practice.[16] *It-*

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[15] Mahmassani, "Transactions in the Shari`a," 190.

[16] At this point I would like to explain why several opinions of mine filed in another unrelated litigation, and referred to at the Saudi law hearing, have no relevance to the issues before us here. Those opinions concerned whether it was potentially relevant, for purposes of allowing discovery, to determine whether a defendant's behavior in tort and breach of contract involved intentional fault or even bad faith. I declared that this issue is relevant, essentially because such evidence could potentially strengthen the case for all three of the elements of an *itlaf* claim: fault, causation, and damages. As to fault, either an intention to harm or bad faith can substantiate fault, and moreover such a showing would help exclude the possibility of excuse. As to causation, evidence that defendant intended his acts to cause the harm obviously helps in proof. Finally, as to proving damages, I noted that certain decisions have issued from the Board of Grievances allowing judges to estimate damages when it is clear that the plaintiff suffered actual out-of-pocket losses but lacks sufficient evidence of them. One earlier decision upheld on appeal declared that the defendant's fault is a valid reason for a judge to be liberal in estimating actual damages. My opinions in this prior litigation have no relevance here for two major reasons: (a) it is neither a usurpation case [nor analogous to] a usurpation case; it is a garden-variety case of *itlaf* (destruction) caused by breach of contract; and as such, it admits of no possibility for claiming the forms of enhanced damages that are unique to the tort of usurpation; (b) as to damages it, again, involves only how to estimate plaintiff's actually occurred, out-of-pocket damages, not any of the forms of enhanced damages claimed or discussed in this case, such as lost profits or imputed usufructs, whether those of the defendant or the plaintiff; again, the process of estimating damages for actual "destruction" or out-of-pocket losses in that case has no analogy or connection whatsoever to Hallaq's assertions in this case, namely, that usurpation law allows ExxonMobil to recover, in addition to its full actual losses, enhanced damages for SABIC's putative profits on that money. For a Saudi judge, the distinction between determining actual losses (the invariant rule for damages for contract breach) and awarding enhanced damages over and above a money judgment (extraordinarily difficult to imagine under Saudi law even were usurpation shown) is vast and wholly decisive. It should be

laf rules do not contemplate any claim to recover the profits reaped by the defendant from his use of the plaintiff's property. Since this is true even as to tangible, concrete property, it is all the more emphatically true as to money, given the rigid resistance to paying compensation for the withholding of money.

22. Redoubling the anomaly, Prof. Hallaq's opinions seem to treat *itlaf* (destruction) as a sub-case of usurpation, instead of as an independent, and broader, tort.[17] In this position he seems to be all alone, apparently misled by the admittedly confusing fact that the discussions of *itlaf* (destruction) appears within the "book" of usurpation in Hanbali texts such as *al-Mughni* or Buhuti's two books. Buhuti is, however, explicit that *itlaf* is not usurpation.[18] In any event, Hanbali works and scholarly treatises uniformly treat the two torts as distinct.[19]

23. A third striking anomaly about Prof. Hallaq's position involves an Islamic law damage rule even more axiomatic and universally known than the limits on recovery

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noted that just by mentioning "intentional tort," "unfairness," "wrongfulness," in those prior opinions, I do not in any way implicate usurpation or its measure of damages. Contrary to Hallaq's views, usurpation is not a generic principle, while these other conceptions are; usurpation is a specific, clearly defined intentional tort allowing a specific measure of damages.

[17] See, e.g., Post-Trial Declaration, 11 n. 1. Here he also betrays lack of awareness of the well-known difference between *itlaf* and *ghasb* measures of damages. His confusion on this point may account for his frequent assertion that many cases exist where usurpation damages are awarded when the facts do not constitute usurpation according to its definitions. E.g., id., p. 3. Compare on the last point `Abd al-Jabbar Sharara, *Ahkam al-ghasb fi al-fiqh al-islami* (Beirut, 1985) 66-67, revealing how few acts are analogized to *ghasb*.

[18] al-Buhuti, *Kashshaf*, 4:113.

[19] See id., al-Qari, *Majalla*, §§1378-1422, 1423-1456 (treating the two torts as separate sections within a book called *ghasb*); W. al-Zuhayli, *Nazariyyat al-daman* [Theory of damages] (Damascus, 1997), 67-69; S. Mahmassani, in "Transactions in the Shari`a," 188-190 and in *Nazariyya*, 157-164, 165-218 deals in wholly separate sections with *itlaf* and *ghasb*.

of lost profits. This is the rule prohibiting compensation for a defendant's delay in paying over money (in our system we compensate this through pre-judgment interest). This is because, even if a plaintiff can in some cases recover damages for the actual usufruct or use-value of property of which he was deprived (since to Hanbalis usufructs can be property), he cannot accomplish this as to money, since money (because of the usury rules) has no usufruct. At the cutting edge of modern fiqh thinking are several scholars trying to develop a legal argument which might enable the levying of damages on someone who, despite possessing sufficient wealth, delays the payment of sums of money owing; among the theories they are trying is the idea of forcing the debtor to pay over some measure of profits made during the delay, either those actually reaped by him through his business, or by the debtor. So far these scholars have been met with vigorous opposition from others, on the ground that their theories have taken them beyond the legitimate bounds of fiqh principles.[20]

24. Yet, anomalously, as Prof Hallaq states his doctrine of usurpation, he does not feel it necessary to lay down any special rules to apply to money (or other fungible goods subject to the restrictive rules on *riba* ("usury," "interest") and *dayn* (i.e., property defined in the abstract, as opposed to concrete, specific property) that I have mentioned previously). Thus, it appears to be his doctrine that wherever a defendant ends up being obligated to the other party for a sum of money because of any breach of duty in tort or contract, and refuses to make his payment, then that defendant becomes liable as well, under usurpation, for the profits that he can be shown to have reaped from having had the use of the money.[21]

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[20] See Vogel, *Islamic Law and Finance*, 140, at n. 20.

[21] "If I get the apples and pay you only $8 and the contract says $10, then you can sue me for the $2 and in addition to whatever these dollars made, if I used them in any enterprise. . . . If you come to me and tell me

Unless the defendant had sequestered the money in some way, Prof. Hallaq's rule appears to be that it will be considered to be merged in the defendant's general assets, under "constructive partnership," so that any profits the defendant will have made from his activities over the period in question will proportionately belong to the plaintiff. Again, I mention this to point out that, if such a doctrine were actually to exist, how can the proposition that loss of use of money is non-compensable in contract and tort cases be so often and so categorically repeated?

25. A last series of anomalies about Prof. Hallaq's position is that, while we have been engaged in meticulous discussion of scholars' definitions of the tort of usurpation, primarily those from the Hanbali school, Prof. Hallaq has never offered a definition of his own to place alongside these. As one can glean it from his affidavits and testimony, usurpation seems to be not a distinct tort at all, but rather the standard of damages[22] applying whenever, whether in contract or in tort, one party "takes property" from another "without consent."[23] His idea of usurpation involves (a) no intention or knowledge by the wrongdoer;[24] (b) absence of consent of the

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that the contract is $2 – the contract is $10, you owe me $2 and I don't give you the $2 . . . If I insist on the $8, I would be a usurper, yes." Hallaq deposition transcript, 186:2–187:7. Extending usurpation rules to the garden-variety problem of contract enforcement, especially the issue of payment of the price, is a most extraordinary example of how unprecedented and unstructured Prof. Hallaq's version of usurpation is. Compare Malunassani, Appendix B, where even "denial of a lawful right" (*inkar al-haqq*) is distinct from usurpation. Collecting sums owing under contract is dealt with not as any species of tort but as a matter of specific performance of contract obligations, which has its own vigorous means of enforcement.

[22] "Usurpation law . . . is ultimately a law of torts and damages." Post-Trial Declaration, 2.

[23] First Declaration (September 12, 2002), 4; Saudi Law Hearing (Hallaq) 38:9.

[24] Saudi Law Hearing (Hallaq), 55:2.

victim, which can be shown merely by violation of a contract term;[25] (c) no requirement of forcefulness other than the victim's refusing. to give up one's claim;[26] (d) secretiveness as well as openness.[27] In all these respects, his definition could be made to apply to *itlaf* (with its different measure of damages), not to *ghasb*. Given Prof. Hallaq's vague definitions of usurpation, he needs to account for the universal, or near-universal, presence of terms like *istila'* (lit., seizure) or *qahran* (lit., forcefulness) in the standard Hanbali definitions. Why would Hanbali scholars insist on these terms consistently if their aim were to describe a standard of damages generically applying to contract and tort cases?

26. Many other questions arise if one attempts to understand the workings of Prof. Hallaq's idea of usurpation. For example, the damages standard Prof. Hallaq lays out apparently includes all profits that, to a reasonable certainty, can be shown to have been reaped by the defendant from his possession of the plaintiff's property. Prof. Hallaq has acknowledged a requirement that these profits be shown actually to exist and are not merely speculative.[28] This raises the issue of how far the proof he requires responds to the universal and fundamental principle against uncertainty in property transfers (*gharar*) and against awards of conjectural damages. Does this not lead to a requirement of concretely tracing profits (as I maintain is stringently needed for recovering profits on money)? In the same vein, Prof. Hallaq must also admit—again if he wishes to respect well-

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[25] Id., 38:9.

[26] Id., 42:19.

[27] Id., 54:11.

[28] See Hallaq, Saudi Trial Hearing, 92:4, indicating profits must be actual and known or else they "would involve speculation as to what the money . . . would have grown into."

known principles—that no recovery would be possible, whether for profits or use-values, with respect to any time after the property is destroyed or lost in the hands of the defendant, even if a long time should thereafter pass before a judgment for recovery of the property's value issued.[29]

Mistaken Uses of Hanbali Law Citations

27. In several cases some major errors have affected Prof. Hallaq's understanding of certain texts from Buhuti (primarily), leading him into errors on key points of law.

28. Prof. Hallaq's insistence that usurpation law allows the court to pursue, and award as damages, profits earned on money usurped is in error in two ways, previously explained. One is that, in fact, Prof. Hallaq cites no text which refers to money at all except the one I have emphasized and repeatedly analyzed.[30] His citations all concern property generally, and hence evade all the crucial considerations. The text I cite, to which he must return if he is to argue for allowing profits on money, is also the text I rely on (along with multiple basic legal principles) for requiring that profits be concretely traced if they are allowed at all. I stand by my earlier interpretation of the text as against Prof. Hallaq's effort to wish away the text's prominent use of "'*ayn*"; it is perfectly obvious that what Buhuti refers to is actual currency in hand and its concretely traceable actual proceeds. This single text suffices as proof for the limitations on recovery for profits on money simply because the entire idea of recovering profits on dayn property, particularly property such as money subject to *riba* restrictions, is so counter to prevailing principles as to

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[29] *Al-Mawsu'a al-fiqhiyya*, 31:243; Vogel, "Contract Law," ¶130.

[30] See my Affidavit Concerning Motions for Judgment as a Matter of Law (JMOL Affidavit), paragraphs 26-31; Rebuttal Affidavit of Oct. 22, 2002, paragraphs 16-19.

earn only the barest, narrowest exception, namely, with stringent tracing of concrete monies.

29. A second error arises as to the argument that money usurped is impressed with a "constructive partnership" if it should be mixed with the usurper's assets. I have made the point before that the provision which Prof. Hallaq cites to establish this position says indeed nothing of the kind. But let me here translate it to make the point obvious.

> If the usurper or someone else mixes usurped property that is indistinguishable, such as oil or currency, with its fungible equivalent (*mithl*), i.e, he mixes the oil with oil or the cash with cash, of the same genus [e.g., silver currency with its like] in a fashion that it is indistinguishable from it, then the usurper is obligated [to restore] the fungible equivalent of the usurped property according to weight or measure from the mixture. This is because he is capable of restoring some of his property to him, along with restoring the fungible equivalent as to the rest. It does not shift to the substitute as to the whole, just as in [the case of] one who usurped a *sa'* [a measure of a fungible good] and part of it is destroyed. If he mixes the usurped goods with something of lesser value or he mixes it with something of greater value, while still of the same genus, or he mixes it with something not of its genus in a circumstance such that it cannot be distinguished, such as oil with sesame oil, or wheat with barley, or wheat flour with barley flour, etc., then the two owners [of the respective properties] become undivided co-owners [*sharikan*] in the mixture in the quantum of the values of the two properties, just as in mixtures not involving usurpation (this by a text from Ahmad bin Hanbal). This is in order that each of them at-

tains to the replacement of his own concrete, specific property ['*ayn malihi*].[31]

Prof Hallaq makes two major errors as to this passage. First, it specifically states that when currency is mixed with currency, the result is an obligation to repay the fungible equivalent from the mixture.[32] It does not discuss partnership, or set out any other mechanism by which growth in the usurped goods could be attributed to the victim of usurpation. It offers no support for application of an enhanced damages remedy in these circumstances. It concerns only what goods the usurper should use to repay the amount of the property usurped. This underlines my view that nothing in this quotation responds to the overriding concerns, dictated by Hanbali legal texts, that profits from money be concrete and positively traced. The quotation does not dissipate, but instead intensifies, the problems for Hallaq's theory that arise from the overriding legal principles of *riba* (usury), *gharar* (uncertainty), or *dayn* versus '*ayn* properties as detailed in my earlier affidavits. Second, Prof. Hallaq in a number of citations mis-renders the term "*sharika*." *Sharika* in Islamic law is used both for partnerships and for undivided co-ownership, which are however distinct legal notions. Most of the citations that Prof. Hallaq asserts concern partnerships actually concern common ownership, as is clear in context.

30. In this connection, in his most recent declaration Prof. Hallaq claims that citations about usurpation in partnership support his case. He names two citations, neither of which is Hanbali. I was able to locate with his edition only one of the two citations, including two cases both of which concern undivided ownership, not part-

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[31] Al-Buhuti, *Sharh*, 3:410.

[32] Compare Ibn Qudama, *al-Mughni*, 5:429, declaring the view that here the payment has become entirely abstract property (*dayn*), on the ground that by mixture the property is as if destroyed.

nership.[33] It should be noted that, in Hanbali law, a co-owner has no right without his co-owner's permission to use the shared property, while a partner does.[34] Prof. Hallaq also fails to recognize the distinction between shared property in partnership and the property of the partners themselves. Individual partners obtain final rights to distributions of property from partnerships only at certain times and after certain conditions are met.

My Use of Contemporary Treatises on Islamic Law

31. Prof. Hallaq attacks my use of modern Islamic legal scholars' works. I find this surprising, since these works are among the most persuasive of proofs one can offer, certainly as to the basic propositions of Islamic law that we are discussing. While no substitute for study of Hanbali and Saudi evidence, they certainly help confirm that our reading of the latter is on track.

32. First, as Prof Hallaq should be aware, these are not works that purport to cover only one school, but rather discuss all of Islamic law's four schools comparatively, including in every case the Hanbali school. Prof. Hallaq is aware that modern scholars, particularly the comparativists such as I am citing, strive not to restrict themselves to the doctrines, or even the interpretive methods, of any single school. I cite some of the most respected comparativist scholars of Islamic positive law in the twentieth century, such as Mahmassani, Khafif, and Zuhayli. These scholars have earned renown throughout the Muslim world. I cite the *Fiqh Encyclopedia* (*al-Mawsu'a al fighiyya*), the collaborative long-term effort of many scholars to portray the basic teaching of all the schools on all legal subjects, with extensive citations to original sources. I cite a monograph on the

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[33] Ibn Hajar al-Haythami (Shafi'i), *al-Fatawa al-kubra al-fiqhiyya* (Beirut, n.d.), 3:94.

[34] Al-Qari, *Majalla*, Art. 1796.

subject of usurpation, covering all Sunni legal schools as well as other schools.[35]

33. These works are known, collected, and consulted as much by Saudi jurists as much as jurists elsewhere. Quite often works on Islamic law, comparing views among schools and with Western law, are written while their authors are spending time in Saudi Arabia teaching in the universities, and these texts are used in teaching Islamic law in Saudi Arabia. Like judges in this country, judges in Saudi Arabia will rarely cite treatises, preferring to cite the immediate sources of law, in this case the Qur'an, Sunnah, and Hanbali texts. But for our purposes, to prove basic points about the basic structure and rules of positive Islamic law, particularly comparative or structural ones, treatises serve many useful purposes.

34. These works are for our purposes particularly persuasive because they strive to interpret for modern readers the internal structure, basic concepts, and overarching principles of Islamic law works—and also aspects of them that do not readily appear on their face but become significant in juxtaposition with modern or Western legal systems. Thus they are particularly useful for modern scholars (including Prof. Hallaq) and modern lawyers, since none of them have the firsthand knowledge of the old working legal systems that the old works presume of their readers. Immersion in the original sources without basic orientation can lead readily to major errors. That is why I have chosen to present evidence of scholars' views while also carefully and directly examining the Hanbali sources and indications of actual Saudi practice. In contrast, Prof. Hallaq has not cited a single such scholar or treatise in support of his extraor-

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[35] Sharara. See also S H Amin, *Wrongful Appropriation in Islamic Law* (Glasgow: Royston, 1983) (emphasizes Shi'i and Iranian law). For example, Sharara, 26-67, quotes and exhaustively analyzes writings from the Hanbali and other schools as to the definition and elements of *ghasb*.

dinary view of the tort of usurpation and its damage measure.

35. As I have shown by repeatedly citing them, these works do not support Prof. Hallaq's views. These works simply do insist on a number of narrowing requirements for usurpation that Prof. Hallaq discards. As I have explained, taken as a whole these works portray the tort of usurpation as the wrongful seizure of or aggression against, the existing, discrete property rights of another, by means that must not be either surreptitious, deceitful, or under color of right, and in circumstances objectively indicating that the usurper acted with full intention to commit the tort. Prof. Hallaq is alone in omitting not just one but all of these defining characteristics of usurpation.[36] Similar basic conflicts with accepted views on Islamic and Hanbali law, as well as Saudi practice, affect his ideas of the scope of damages under usurpation.

Relevance of Parties' Knowledge to Waiver or Amendment of Terms in Ja'iz Contracts

36. It is apparently believed that I support a view that, for any change to occur in the terms of a *ja'iz* contract, it is a categorical necessity that both parties first be aware of how exactly the contract is being changed and then explicitly consent to it.[37] This statement would elide any

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[36] Compare Sharara, 33-36, showing the considerable concurrence of the Sunni schools on the defining elements of *ghasb*.

[37] The ExxonMobil brief on contract damages (p. 16) cites my deposition testimony (Vogel deposition, 312-19) out of context. The quoted language (transcript, 318) is not a conclusion but an effort to restate an aspect of a series of hypothetical questions I was being asked in a jumbled fashion, some of them mixing in a separate point (the degree of identity between a partnership and its partners). I noted specifically that there "are other hypotheticals in your case. Those are not being addressed by this." I then stated that "what I am talking about here, I think this is needed to clarify my opinion, which apparently is misunderstood . . . What I'm talking about is the ease with which partnership relations are al-

distinction between *ja'iz* contracts and *lazim* ones, and would make it inexplicable why I brought up the distinction in the first place. The view just cited overlooks two relevant points. One is the logic that waiver can occur merely by failing to insist on a term under circumstances that would otherwise imply its amendment or abrogation. The logic of this seems common to any system of contract interpretation. My point is that the tendency to find such waiver or amendment is all the more natural in a system recognizing the notion of the vague, flexible, prospectively not-binding *ja'iz* contracts.[38] The second relevant point is to recall that the distinction between *ja'iz* and *lazim* contracts resides chiefly in the relative expectation of non-specificity and openness to change that applies to them. If a contract, for example, exhibits vague and general terms initially framing a business relationship, then one easily can imagine that the parties' concrete later arrangements could overrule these terms. As *ja'iz* contract theory suggests, the crucial indication of the parties' actual agreement would not be, then, the verbal terms of a *ja'iz* contract made years before, but instead the then-current state of their agreement as shown by then-current implicit and explicit terms, including course of dealing. Under such circumstances, to execute an extraordinarily lengthy *lazim* license agreement providing in great detail as to the very same subject referred to in an earlier short, vague *ja'iz* term is tantamount to accepting any amendment, waiver, or abrogation of the earlier term that might result.

/s/ Frank E. Vogel
Frank E. Vogel

Sworn to before me this 3rd day of June, 2003

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tered." When asked whether agreements have to be altered with knowledge, I said, "yes, or *waiver*" [emphasis added].

[38] See NJ Coulson, *Commercial Law in the Gulf States* (London: Graham & Trotman, 1984), 76-82.

APPENDIX A

SELECTIONS FROM TREATISES CONCERNING LIMITATIONS ON DAMAGES IN ISLAMIC LAW

'Ali al-Khafif, *al Daman fi al-fiqh al-Islami* ["Compensation for Damages in Islamic Fiqh"] (Cairo, 1971). Pp. 20-21.

> Compensation in contractual responsibility [in positive law, viz. modern Western laws] is not compensation for harm to property. It is rather compensation for harm resulting from the debtor's nonperformance of an obligation he undertook based on a contract. . . . *Shari'a* . . . requires that the debtor be [personally] compelled and forced to perform. If he refuses, his refusal is a sin requiring *ta'zir* [discretionary punishment, usually lashing or imprisonment] until he complies. As for forcing him to pay property by way of compensation for damage not constituting loss of a piece of property caused by his refusal, *fiqh* rules and *shari'a* principles [*usul*] do not permit forcing him to pay property by way of [such] compensation. [These rules and principles] demand that the taking of property be either gratuitous or in return for property taken or harmed. Otherwise its taking is [Qur'anically prohibited] unjust enrichment [*akl al-mal bi-al-batil*, "consuming property without right"). Therefore, taking compensation for harms not consisting of the destruction of other property is not permitted in the *shari'a*. This is because the basis for compensation in the opinion of the jurists is the exchange of property for property. . . . On this basis the Islamic fiqh does not recognize the contractual responsibility which positive law accepts, just as it does not recognize moral damages.

`Abd al-Razzaq al-Sanhuri, *Masadir al-haqq fi al-Fiqh al-Islami*, VI:

> *The Concept of Damage [darar] in the Islamic Fiqh is Narrow and Limited.* The Islamic figh dif-

> fers distinctly from Western law [*fiqh*] in the definition of the meaning of damage [*darar*]. For, in Western law, all damage, material or moral, is compensated. Also, as to material damage, all losses which the creditor may be subject to, and all profits he forfeits, are compensated, whether these arise from use, services, or anything else. We have seen that for damages nothing is required other than that they be direct, and, as to contractual responsibility, that they be foreseeable, as we explained in detail previously. As for the Islamic *figh*, it requires for compensation that the property compensated for be of legal value, and that there exist an equivalence between it and any property given as a substitute for it (except in certain limited exceptional cases, which we shall mention). *A fortiori* there is no compensation for any [other] losses which the creditor bears, or for lost profits. . . . Thus, if the debtor is liable for a house, he pays its value, and does not pay the owner of the house the usufruct he lost for a period of time, nor the profits he lost determined on the supposition that he had sold [the house] for its value and invested the proceeds.

S. E. Rayner, The Theory of Contracts in Islamic Law (London: Graham & Trotman, 1991), 170:

> A further offshoot of the concept of *Gharar* is that Islamic law does not recognize the concept of consequential damages in rescinded contracts. Calculation of damages by the Shari'a courts do not therefore take into account anticipated profits, due to the uncertainty of this matter.

Subhi Mahmassani, *al-Nazariyya al-'amma li-al-mujibat wa-al-'uqud fi al-shari'a al-islamiyya* [The general theory of obligations and contracts in the Islamic shari'a] (Beirut, 1972), 506:

> [T]he scholars do not address compensation for damages, losses, or loss of profit caused by delay in

> performance of an obligation. This is in our view because of the concept of forbidden *riba* in the Islamic shari'a.

Noel J. Coulson, *Commercial Law in the Gulf States* (London: Graham & Trotman, 1984), 82:

> Calculation of damages never takes into account anticipated profit because this is a future and unknown quantity.

Nayla Comair-Obeid, *Les Contrats en droit musulman des affaires* (Paris; Economica, 1996), 197-98.

> The [Saudi Arabian] Board of Grievances commercial tribunal, dealing with several cases concerning compensation for damages caused during the execution of business contracts, has set out the following general precepts: 1. Damage caused must be certain, direct, and susceptible of determination by the judge if it is to be recompensed. . . . It must be, as a result, exactly equivalent to the damage. 2. Loss of profits sustained by the entrepreneur as a result of the failure to execute the work constitutes an *alea* [risk] which cannot be the base of any recovery whatsoever. 3. The compensation is allowed to remedy the damage caused, and may not to be a source of enrichment to the entrepreneur suffering from the breach. This is the reason that the compensation must be the exact equivalent of the damage.

Frank E. Vogel, "The Contract Law of Islam and the Arab Middle East," (draft accepted by *International Encyclopedia of Comparative Law*, 1997), ¶ 131 (pp. 148-49):

> [W]e note that Islamic law denies expectancy damages, considering them uncertain, nonexistent and a taking of property without countervalue or consent. Most notably, it denies recovery for unrealized or future gains lost due to default [*lucrum cessans*]. Its protection of the expectancy interest is confined to the vigorous enforcement of specific performance

whenever possible. Other than by restitution of benefits, and occasionally compensating for physical harms caused by default, it shows no concern for the debtor's reliance interest. That the failure to keep one's promise is a tort and entails a measure of liability based in reliance, a stage in the development of common law *assumpsit*, does not emerge. Failure to fulfill one's obligation is, on the other hand, a crime; as such it does not generate a right in the injured party to money compensation. The binding contract remains at root an exchange of property, not promises.

APPENDIX B

SUBHI MAHMASSANI ON USURPATION AND OTHER BASES FOR LIABILITY AND DAMAGES

S. Mahmassani, *al-Nazariyya al'amma li-al-mujibat wa-al-'uqud fi al-shari'a al-islamiyya* [The general theory of obligations and contracts in the Islamic shari`a] (Beirut, 1972), 156-158. The following is a translation of the opening sections of Mahunassani's discussion of *ghasb* in his lengthy study of obligations in shari`a.

Ownership, like other rights, falls within the protection of the law or the shari`a. To invade it is not lawful in any circumstance. We have seen that the sanctity attached to ownership entails the prohibition of transacting in the property owned by another without consent, and the prohibition of taking property of another without a reason lawful under shari`a. One who transgresses this shari`a right is considered a wrongdoer and his act is considered an injustice.

Therefore, the taking of the property of another either is a taking with a lawful reason in which case it is lawful and permitted; or it is a taking without right, in which case it is prohibited and the taker is

a sinner and wrongdoer. The taker is called a thief if the taking was secret and meets the well-known conditions. He is called a brigand if the taking is by overwhelming power (*mukabara*) in the desert or within the city according to some scholars. He is called an embezzler if the taking by deceitful, furtive means from the possession of its owner. He is called a deceiver if the taking was from that which he was given in trust. And finally, he is called a usurper if the taking is open and by force (*jiharan wa q'ahran*). Similarly, prohibited is the taking of the property of people by means of denial of right, fraud, bribery, gambling, and so forth.

[The shari'a definition of *ghasb* is a matter of] difference between the schools. . . . In the approved Hanafi opinion *ghasb* is the termination of the possession of the true owner and establishing illegal possession by seizure of lawful property of legal value of moveable nature by means that are open and notorious (*mujahara*).

Thus there are imposed required elements of usurpation as to the act of the usurper, as to the property usurped, and as to the nature of the taking and its method. Here follows a brief clarification of these [elements]:

First, the act of the usurper. [He discusses the Hanafi school.] As for the other schools, they do not require the termination of possession of the owner, but consider the fundamental element of *ghasb* to be establishing the possession of the usurper over the property of the other without right. Or in other words, *ghasb* for the rest of the schools is the seizure of the right of the other by aggression (*'udwanan*). . . .

Second, the property usurped [he discusses topics such as its lawfulness, whether usufructs or immovables are included, what constitutes seizure for a horse, land, etc.)

Third, the nature of the taking and its method. Taking is not considered *ghasb* unless it is without the permission of the person usurped from or by force leaving him no option. This is obvious, requiring no explanation. Thus the taking must be open and not secretive to distinguish *ghasb* from theft, and it must not be by overwhelming power (*mukabara*) to distinguish it from brigandage. . . .

APPENDIX U

OFFICE OF THE CHAIRMAN

No: 8294

DATE: 12/5/1424
CORR: 12/7/2003

H.E. DR. ABDALLA M. A'AL AL-SHEIKH
MINISTER OF JUSTICE

Your Excellency

As you know, the Saudi Basic Industries Corporation (SABIC) is one of the Saudi joint-stock companies formed for the implementation of petrochemical, fertilizer, iron, steel, and aluminum industries. For the purpose of realizing its objectives, SABIC has, since its formation, established industrial joint ventures with foreign as well as with Saudi partners.

However, the nature of the Corporation's as well as its various projects' business requires entering into several agreements and contracts, whether with its partners or with other third parties, wherein it is provided that Saudi law shall be the governing law. When a dispute arises between the parties regarding such contracts and agreements, which are subject to Saudi law, the Corporation faces some law-suits instituted before foreign courts, a matter which may result in misconception of some juristic or judicial issues as applied in Saudi Courts.

Therefore, your excellency is kindly requested to clarify the status of the Saudi law as applied with respect to the case of ghasb (usurpation), its basis and elements, the compensation which may be awarded as a result thereof and the legal as well as the judicial rules which govern the relationship between an existing general agreement and a subsequent specific agreement which handles in details matters provided for in the general agreement.

Best regards,

Saud Bin Abdullah Bin Thunyan Al-Saud
President of the Royal Commission for Jubail & Yanbu and Chairman of SABIC Board of Directors

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KINGDOM OF SAUDI ARABIA
MINISTRY OF JUSTICE

NO: 6/48384/24

DATE: 24/7/1424H
ATTACHMENTS: 18

His Highness the President of the Royal Commission for Jubail & Yanbu and Chairman of SABIC Board of Directors

Greetings

Reference to Your Highness's letter No. 8294 dated 12/5/1424H corresponding to July 12th, 2003, wherein Your Highness requested a clarification of the rules relating to *ghasb* (usurpation), its basis and elements, the compensation which may be awarded as a result thereof and the judicial rules which govern the relationship between an existing general agreement and a subsequent specific agreement....etc.

Please find enclosed herewith a study about this matter, which includes a reply to your inquiries, for your information and perusal.

Best regards

Saud Bin Abdalla A'al Askar
Acting Assistant Deputy Minister of Justice for Judicial Affairs
23/07/1424 H

I. Definition Of *Ghasb* (Usurpation) And Determination Of Elements Of *Ghasb* (Usurpation):

(1) Definition of *Ghasb* (Usurpation)

The jurists of the Hanbali guild defined g*hasb* (usurpation) by several definitions. Al-Mardawi in his work 'Al-Insaf' defined *ghasb* (usurpation) as "*al-istila'a ala mal al-ghayr qahran bighayri haqq*," which means "the taking of another's property forcibly and unlawfully."

Ibn Muflih defined it as "*al-istila'a ala haqq ghayrihi qahran zulman*," which means "the taking of another's right forcibly and unjustly."

It was also defined as "*al-istila 'a ala mal al-ghayr qahran zulman*," which means "the taking of another's property forcibly and unjustly."

Al-Bahwati defined it as: "*al-istila'a ala haqq ghayrihi, malan kan aw ikhtisasan, qahran bighayri haqq*," which means "the taking of another's right, be it a property or entitlement, forcibly and unlawfully."

It appears from the definition of Hanbali jurists for ghasb (usurpation) that they stipulate that the taking of another's property should by force with the intention of aggression and injustice. Late Ibn Hubaira, one of the Hanbali jurists and judges, stated in his book "*Al-Ifsah*" that: "They (the jurists) agreed that the *ghasb* (usurpation) is taking forcibly by aggression."

Emphasizing on the importance of the element of "*qahr*," Al-Mardawi stated that: "*annahu luw ista 'wla ala haq ghayrihi min ghayri zulmin wa la qahran fa innahu la yusamma ghasiban*," which means "if he takes a right of another without injustice and without force he will not be considered as a usurper."

It appears from the foregoing that the idiomatic meaning of *ghasb* (usurpation) is a special meaning which involves certain elements and controls, and this also applies to the idiomatic meaning of theft and embezzlement. The jurists

distinguish between each one of them according to the controls and elements of each one of these acts, and they give great significance to these distinguished elements. As such, any act to which one of the elements of *ghasb* (usurpation) does not apply will not be considered as *ghasb* (usurpation) by the jurists.

(2) Elements of *Ghasb* in Saudi Law

The Saudi law is based on the Islamic Laws "*Al-Shari 'ah Al-Islamiah*" in accordance with the guild of Al-Imam Ahmad Ibn Hanbal, with consideration to the views of other juristic guilds and being guided by the views of the researchers from qualified scholars and those vested with giving legal opinion "*ahl Al-Fatwa.*"

The most important steps which Saudi Courts undertake when deciding on suits involving *ghasb* (usurpation) alleged by the parties is the classification of the suit from *Shari'ah* and legal point of view, and look deeply into the juristic controls provided for, and hence apply those controls on the suit presented before the court. The most significant of these elements and controls, which are the subject matter of consideration and verification, are those stated in the definition of Hanbali jurists for the meaning of *ghasb* (usurpation), which can be summarized as follows:

(1) The Concept of Istila'a (Taking):

The jurists define "*al-istila'a*" (taking) as: "exercising power over the subject matter as it is and as it may become." This concept should be applied to the incident in question, and the act which constitutes taking, and what kind of acts to be described as taking.

Moreover, it is also necessary to determine the type of taking: whether with or without permission. The permitted taking will not be considered as *'istila'a'*. The permission may be either express or implicit by indication, and there is no difference between express permission and the implicit permission, according to Islamic law maxims which are judicially and juristically established.

(2) The Concept of Qahr (Forcibility):

It is one of the most important elements that distinguishes *ghasb* (usurpation) from other forms of taking when deciding on a *ghasb* suit in Saudi Courts as stipulated by Hanbali jurists. *Ghasb* (usurpation) is a group of combined descriptions which, without them, it cannot be determined. The most significant of which is the description of forcibility which denotes the meanings of conquering, openness, overpowering and humiliation, and thus excludes theft and embezzlement, because they are not by way of force, but rather by way of stealth. It also excludes the taking of property voluntarily, such as deposit, loan, endowment or the like, which is considered as taking the property voluntarily and with consent and not by way of force. Their saying "*qahran*" (forcibly) also excludes the property taken by way of agreement and contracting such as the property of partnership and speculation, which is not a taking by way of force and because contracts are not the subject matter of *ghasb* (usurpation), as usurpation is an act extrinsic to them. Their saying "forcibly" also excludes a person who takes a property, thinking that it is his own property, and this will not be considered as *ghasb* (usurpation) because it was taken by a way not involving force and because of lack of intention of aggression and injustice in taking the property.

(3) The Concept of Openness and Notoriety

This is also one of the important controls which distinguishes *ghasb* (usurpation) from others, as it occurs by way of openness and notoriety from its beginning to its end and as such, the element of openness is essential to *ghasb* (usurpation). Therefore, attributing openness to *ghasb* (usurpation) indicates that it is one of its basic elements and one of its characteristics, which it cannot be without it, and through which it could be determined whether there is *ghasb* (usurpation) or not.

(4) The Concept of Unlawfulness

The taking of another's property might be rightful, as mentioned before in the case of taking the minor's property

by his guardian and the bankrupt's property by the ruler, or if the taking was permissible expressly or implicitly.

(5) The Intention of Trespass in Ghasb:

It is one of the important juristic controls considered by the Saudi Courts, which indicates the existence or non-existence of *ghasb* (usurpation), as there must be an intention of trespass in taking the property of another person to constitute *ghasb* (usurpation). As mentioned hereinbefore, Ibn Hubairah, who is one of the Hanbali jurists and judges, stated in his book, Al-Ifsah, that: "*ittafaqu ala anna al-ghasb akhzun bi udwan qahran*" which means "they (the jurists) agreed that *ghasb* (usurpation) is a forcible taking with aggression."

So, trespass in *ghasb* (usurpation) is different from trespass in other kinds of taking of another's property in that it was intended to cause aggression and injustice, and is therefore at the highest degree of trespass and is described as aggression and it is the utmost in trespass, or it is injustice itself. This means that *ghasb* (usurpation) is a crime against property, and it is a kind of aggression and injustice, and intention is one of its indispensable elements. Therefore, in *ghasb* (usurpation) the taking should be with the intention of trespass and causing injury to the other party. It appears from the foregoing that a person who takes a property, which he thinks as his own property, will not be considered as *ghasb* (usurpation) because of lack of intention of aggression and injustice in the taking.

The court will look into the type of taking, whether it is intentional by way of aggression and force, then it constitutes *ghasb*, and this will be determined through looking into the instituted suit and the surrounding circumstances and conditions. The *ghasb* (usurpation) is a kind of open and notorious crime exercised on another's property. It is a kind of clear trespass, injury and injustice which does not accept guessing, and can be recognized by sense or distinctive features and by the obvious indicative surroundings.

(6) The Origination of Ghasb (usurpation):

The Court also looks into the origination of *ghasb* (usurpation) and considers how it occurred. The nature of *ghasb* is that it is a harmful act and independent by itself. Its nature necessitates that its occurrence should be different from other harmful acts which take place between related parties. It differs from defaults that occur between the parties regarding the performance of certain obligations, and consequently the courts look into the suits instituted between two parties or more resulting from differences or defaults in performing a certain obligation. This is because some people institute their suit in case of dispute based on *ghasb* (usurpation), since *ghasb* (usurpation) is a wide door of warranting compensation, and expressing that the injury that fell on them is a grave and obvious injury which should be compensated. However, upon verification and deep consideration it may be discovered that there is no *ghasb* (usurpation), and that the suit in its reality, and upon classification in accordance with the previously stated juristic rules, is a sort of disagreement between the parties regarding the performance of a contract or a specific obligation and not a *ghasb* (usurpation).

Based on the foregoing, the presumption is the non-existence of *ghasb* (usurpation), as the established rule juristically and judicially is the presumption of innocence unless judicially proved otherwise, such as if the usurper admits committing usurpation or by any other kind of evidence recognized by Shari'ah Law.

(7) When Did the Taking Occur:

This is one of the important points which Saudi courts consider to determine, as the judiciary is substantive and looks into the circumstances and conditions surrounding the case, and looks into the nature of the relationship between the parties to the suit in view of agreements and contracts between them, and what is possible to be unknown and what is not possible to be so. Therefore, the court considers the time of taking the property of another person, and whether this happened recently or a long time ago, so that a period of

time has elapsed where it cannot be said that one party was ignorant of what was going on, a matter which constitutes a presumption of consent and implied permission.

(8) The Form and Nature of Ghasb (Usurpation):

One of the important points through which a *ghasb* (usurpation) can be distinguished from other forms of taking property of another person is the form, nature and description of *ghasb* (usurpation). This is because the taking of another's property may take other forms which *ghasb* (usurpation) can differ from them in some of its aspects, and this helps in determining *ghasb* (usurpation) by the court. For instance, *ghasb* (usurpation) differs from theft in that *ghasb* involves the meaning of force, openness and notoriety of the act from its beginning to its end, contrary to theft which involves stealth. Also, *ghasb* (usurpation) differs from embezzlement and cheating, as the *ghasb* (usurpation) is taking property by way of force and openness. The nature of *ghasb* (usurpation) is that the usurper does not hide and does not intend to take the property in circumstances lacking help and rescue, but rather he takes the property by way of openness, notoriety, force, aggression and injustice.

(9) Ownership of the Other Party of the Property Taken

This is one of the matters to be verified by the court before deciding on *ghasb* (usurpation). The court will verify whether the property alleged to be taken is owned by the person alleging *ghasb* (usurpation). If he is the owner, the court will hear his case. But if he is not the owner or an authorized person to claim that property, his case will not be heard by the court as he has no interest in the case.

(10) Lack of Suspicious Ownership

The court also considers lack of suspicious ownership on the part of the person who takes another's property, because if there is such suspicion, it will negate the intention of trespass and aggression in taking, and as such one of the important elements of *ghasb* (usurpation) is not satisfied, thus there can be no *ghasb* (usurpation) without it.

These are the most important elements which are deeply looked into by Saudi courts to determine whether there is *ghasb* (usurpation) or not, and which are practically applied in *ghasb* (usurpation) cases in courts.

It is noteworthy to state here that the role of the courts in determining the *ghasb* (usurpation) is an important and crucial one, due to the consequent remedies in the concept of warranting compensation, and due to the fact that litigants normally resort to build their cases on the basis of *ghasb* (usurpation) because it is the highest ceiling of claim, and as an expression of their serious injury according to their allegation, and because the *ghasb* (usurpation) sometimes arises from a contingent dispute in contracts and agreements concluded between the parties, though such claims are not classified as *ghasb* (usurpation) from a legal or judicial point of view, they might be some kind of mutual defaults or oversights, or may occur without intention of aggression and trespass. Therefore, the courts consider several steps for verifying the surrounding circumstances and conditions as well as the nature of the contractual relationship between the parties before passing judgment.

II. Principles & Basis Of "ta'aweedh" (Compensation) And Conditions For Being Entitled To Compensation And Situations In Which Compensation Shall Be A Fungible Or An Ad Valorem In *Fiqeh* And Saudi Courts:

(1) Principles Governing Compensation in the Opinion of Jurists:

First Principle: Forbidding (*tahreem*) The Wrongful Taking Of People's Property:

In Islam property is as sacred as a soul, and is one of the five fundamentals which Shari'ah has come to protect and maintain. Therefore, as it is forbidden to cause injury initially by trespassing on others' property, the injured party is not allowed to trespass and take more than his right without legal justification.

Allah the Almighty said what means: "Eat not up your property among yourselves in vanities." (*surat al-nisa 'a*-29)

However, as the compensation for injury is often awarded by a judgment of a ruler, it is convenient to refer to the Holy Quran verse: "nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property" (*surat al-baqarah*-188).

This verse denotes that he who wants to wrongfully take people's property, he often resorts to a person who can legalize his conduct, such as the judgment of a ruler. Therefore, the warning came that the judgment of a ruler awarding a property of someone to another does not justify it if the plaintiff is aware of its wrongfulness, as this is one of the aspects of wrongfully taking the people's property, even if awarded by a judgment of the ruler.

The *Sunna* of Prophet Mohammad (peace be upon him) confirmed the principle of forbidding the wrongful taking of the people's property through many "*Hadiths*" (Prophet sayings) which connect property with the other most important Shari'ah ends which are soul and honor.

Of these "*hadiths*" (sayings) are the following:

1. The saying of the Prophet (peace be upon him) in his last pilgrimage to Mecca: "Your bloods, properties and honor are forbidden amongst you, like the sanctity of your this day, in your this month, in your this homeland."

2. His saying (peace be upon him): "The whole of a Muslim is forbidden to a Muslim: his blood, property and honor."

3. His saying (peace be upon him): "No property of a Muslim is accessible except by his free will."

Based on the foregoing clear cut texts, the jurists have unanimously agreed on the forbiddance of wrongfully taking the people's property.

Second Principle: The "*Ta'aweedh*" (Compensation) Covers The Actual Injury Sustained:

This principle denotes that the aim of compensation is to redress the injury which actually occurred, because injury is a material act, and therefore, it is necessary that the compensation be assessed on the basis of covering the injury actually sustained no more no less.

As the actual injury should be covered, the affected party should not take more than what he lost, because the compensation was legislated to redress the decrease or loss of property. Therefore, if the act does not entail an injury, it will not be compensated, because according to juristic rules compensation shall not be awarded unless for an injury actually sustained.

(2) Basis of Compensation in Fiqeh & Saudi Courts:

"*Ta'aweedh*" (compensation) in *Fiqeh* and Saudi courts is based on a group of principles and rules, the most significant of which are:

(1) "*Ta'aweedh*" (compensation) in *Fiqeh* and Saudi courts, and according to Shari'ah rules, does not arise except in consideration of a property taken or damaged, and consequently "*ta'aweedh*" (compensation) cannot be awarded unless there is an injury sustained which should be redressed and removed.

(2) "*Ta'aweedh*" (compensation) is just for redressing the injury and not a means for realizing a financial gain or enrichment at the cost of another. It also obviously differs from punishment, because the purpose of punishment is to rebuke and discipline the wrong doer, while the purpose of "*ta'aweedh*" is to redress and repair the injury.

(3) The injury which should be redressed is the injury to property, while the injury to feeling, honor or reputation (which is known as moral or incorporeal injury) will not be redressed by financial award as established by Shari'ah rules and as unanimously agreed by the jurists, who decided that by its nature it is not a subject of "*ta'aweedh*" (compensation), because damages cannot be imposed except in consid-

eration of property taken or damaged, and the moral or incorporeal injury is not considered a financial loss and as such can not be redressed by "*ta'aweedh*" (compensation).

(4) The "*ta'aweedh*" (compensation) awarded by reason of taking the property of another person, will only be imposed if it is not possible to return such property, in which case it will be awarded to return a similar one if it is a fungible or its value, and this is the amount which should be awarded according to the judicial and juristic rules, and should not be more than that, because, as said before, the "*ta'aweedh*" according to jurists is just to redress the injury.

(5) According to juristic and judicial rules, "*ta'aweedh*" (compensation) for injury does not include what is called compensation for lost opportunity, which is a compensation for missed opportunities by reason of damage to property or *ghasb* (usurpation), since there could be a chance for investing the property during *ghasb* (usurpation) period. By unanimous agreement of jurists, there shall be no "*ta 'aweedh*" (compensation) for this kind of injury because it is similar to "*riba*" (usury,) as being an increase in the property by reason of time factor. This is not allowed according to juristic rules, whether the "*riba*" (usury) is intentional, or the claim for compensation was in such form (lost opportunity), as it actually and constructively conforms with *riba.* No doubt that the materialistic spirit which dominates several people today made them look for speculative opportunities, a matter which leads to fall into *riba* (usury) and to taking people's property wrongfully. The reality is that all Muslim Jurists view that the basis of pecuniary compensation is to redress the injury by substituting a property in the place of a lost property equivalent to it, in order to restore the previous situation, in elimination of injury and redressing the loss.

(3) Conditions For Being Entitled to Compensation:

The jurists have stated certain conditions for being entitled to "*ta'aweedh*" (compensation) in accordance with juristic rules established by Shari'ah as follows:

First: The Injury Should Fall On A Valued Property:

The valued property is: anything that has a value which necessitates being compensated by a trespasser, because the legislator has given it protection and made it sacred. It combines two elements:

(i) Being acquired and actually possessed;

(ii) It is permitted to be used by Shari'ah in normal and voluntary cases, i.e. without pressing circumstances.

Second: The Injury Must Be Realized:

The jurists stipulate that for an injury to be subject to compensation, it must be realized, which means the injury should actually be sustained, because injury is the cause of compensation, and the cause does not come before the causer, and hence the right for compensation arises from the time the injury becomes actually sustained.

The *Fiqeh* and courts do not permit compensation for future injury, because saying so will lead to injustice, since it is not assessable instantaneously and may lead to unacceptable results in case the injury exceeded the assessed compensation or is less than it.

Also, it is not permissible judicially and jurisprudentially to award compensation for speculative injury, as Shari'ah jurists do not advocate awarding compensation for speculative injury in general, and do not advocate awarding compensation to the affected party for lost profit, as this is a speculative injury.

Also, it is not permissible judicially and jurisprudentially to award compensation for loss of opportunity, because here the injury is not realized and is an incorporeal injury, just like moral injury which does not have pecuniary compensation.

This means that once an injury occurs, there must be compensation. For instance, if someone digs a well in a public road, and an animal falls into it but is not injured, then the digger is not obliged to compensate for anything, though he

has to eliminate the source of the injury by filling up the well with earth, because the purpose of compensation is to redress the loss that happened to the property of the injured party.

Third: The Injury Must Be Direct:

The injury must be as a natural and direct result of the trespass act committed by the trespasser, even if several injuries resulted from one act, as long as the injuries ensued from that act which caused them.

The rule in *Fiqeh* and in courts stipulates that the direct doer warrants to compensate even if he did not trespass, and the doer by causation does not warrant to compensate unless he was a trespasser. For instance, if someone cuts the wire of a hanging lamp and thereby causing it to fall on the ground and break into pieces, he will then be considered as directly damaged the wire and broke the lamp by causation.

The distinction between directness and causation is that the former is realized by the connection of the doer's act with the thing itself and the damage is caused by it, such as when somebody hits an animal and kills it, while causation is realized by the connection of the effect of the doer's act and not his real act. If the direct doer and the doer by causation are combined together, the rule will be added to the direct doer. Ibn Rajab Al-hanbali said in his book (*Al-Qawa 'id*): If the damage to property and souls of human beings is attributed to directness and causation, the warranty to compensate shall be connected with the directness and not with causation unless the directness is based on the causation and as a result thereof.

(4) The Circumstances in Which "Ta'aweedh" (compensation) is a Fungible or an Ad Valorem:

The jurists have agreed that rights should be returned themselves if possible, and hence if the usurped property is still existing and not damaged then, in that case, it is imperative to return the usurped object itself in total, because the right of the owner is connected to the specific object of

his property and, consequently, the recovery of the specific object itself is the basic rule.

Ibn Qudama in his work (*Al-Mughni*) said: "The scholars unanimously agreed that it is imperative to return the usurped item itself if it still exists as it is without any change."

The proof of the imperativeness of returning the usurped property to its owner if the usurped property still exists is the saying of Prophet Mohammed (peace be upon him) which means: "The hand warrants what it has taken until it returns it," and his saying (peace be upon him) which means: "If one of you takes a stick of his brother, he should return it to him." The two sayings of the Prophet (peace be upon him) prove that it is imperative to return the property itself to its owner, and that it is not allowed to resort to an alternative while the original is available.

However, in case the property itself is damaged or consumed, then the owner shall have the right to claim a substitute from the usurper, and that could be by returning an equivalent if the usurped property is a fungible. This was unanimously agreed upon by the jurists as reported by several scholars.

In order to know the situations and circumstances in which the compensation shall be a fungible or an ad valorem, it is necessary to define fungible property and ad valorem property separately, as follows:

1. ***Fungible Property (mal mithli) as defined by jurists:***

Hanbali scholars defined fungible property as: "*Al-mithli*" is "any dry measurable like seeds, dates and the like, or weighable like raw iron, which could be a subject of *Sa'lam* (payment in advance for deferred delivery)." (Bahwati, Al-Sharh, 2/418).

It appears from the definition of the Hanbali jurists that the meaning of the fungible property can be determined as: "it is that of similar units or parts in a way that some of which can replace the other, without significant difference,

and it is normally assessed by weight or dry measure and can be a subject of *Sa'lam* (payment in advance for deferred delivery)." Any other property which does not satisfy the foregoing definition is not "*mithli*" but will be "*qaimi*" which means "an ad valorem."

Therefore, the control is the similarity which leads to no difference in value between parts equal in dry measure or weight, or between units similar in volume.

Mithli (fungible) is a description given to property which is normally assessed by weight, such as gold, silver, copper, iron and other weighable.

It is also given to property normally assessed by dry measure such as seeds, e.g. wheat, barley, dates, corn, rice or the like.

It is also given to property assessed by counting, and which there is no difference in the value of its parts, i.e. its units are similar such as eggs, oranges and the like.

Fungibles also include merchandize of the same kind if their units and parts are similar without significant differences, such as fabrics and textiles if they are of one kind with similar characteristics.

Money is also a fungible, whether it is in the form of gold, silver, copper or banknotes, as far as they are similar in substance, amount and form.

It appears from the foregoing that fungible property is compensated by the same kind, as this is just and fair and realizes redress and compensation in the best possible way, which is the aim of compensation.

2. Ad Valorem Property (al-mal al-qaimi)

Idiomatically "*mal qaimi*": "is that thing with no similar one in the markets, or there is a similar one but with significant difference in value," or it is that "thing which cannot be substituted by another one, even if it is of its kind, such as animals which are not sold by counting, lands and houses."

Some jurists defined it as: "anything with variable units, and as such none of its units replaces the others without difference, such as houses, lands, trees and animals."

It appears from the above definition of ad valorem property that anything that is not fungible "*mithli*" is an ad valorem property "*qaimi*," and that what is assessed by value is wider and more comprehensive than what is assessed by its equivalence. Consequently, the ad valorem property "*qaimi* " includes lands, buildings, animals—even if of one kind—as there is still a difference between them from several aspects and descriptions.

The ad valorem property also includes those assessed by measurement, such as fabrics of different kinds, or those with different units in a way that makes a difference in their value.

The ad valorem property also includes precious stones, as each one of them has special value for its characteristics and descriptions, and also the merchandize of a different kind.

It is noteworthy to state that it is possible that factors of custom and time may interfere and change ad valorem property into fungible and the fungible property into an ad valorem property, as the development and accuracy of the industrialization turned a lot of ad valorem properties into fungibles, such as fabrics and books because prior to the industrial development their units were significantly different.

Likewise, the fungibles may turn into ad valorem property if used and its condition was transformed and gave it a special value different from the value of its similar, such as rare books, ancient items, obsolete coins which can rarely be found.

Based on the foregoing, the steps taken by the courts before passing judgment with compensation to be imposed against the damage are as follows:

The basic rule is that if the compensation resulted from *ghasb*, and the usurped property still exists, the usurper is bound to return the property itself. But if the compensation

resulted from damage, i.e. the usurped property is damaged, it is imperative to compensate the right of the owner for his damaged property, because if it is not possible to return the property itself, it is imperative to return a substitute.

The damaged property will be looked at: whether it is from fungibles or from ad valorem property? If it is from fungibles then it will be compensated by its similar, as said in the Holy Quran which means: "If then any one transgresses the prohibition against you, transgress ye likewise against him" (*Surat al-baqarah 194*).

This will redress the damaged property in form and meaning. The fungible shall not be replaced with its value unless it is not possible to pass judgment with a fungible, because the right of the owner is connected to the property itself. If his property itself no longer exists as a result of damage, then he will be entitled to a similar one in form and meaning, and if it is not possible to find a similar property, then it shall be resorted to the value in order to redress the injury caused to the owner.

These are the most significant steps and rules which will be considered by Saudi law and applied by Saudi courts when a case of *ghasb* is proved and the usurped property is damaged. *It should be noticed here* that the compensation of a fungible is applied only upon damage to the specific objects of similar kind. But property other than specific objects of similar kind, such as usufructs and incorporeal rights, are not compensated by a fungible, as unanimously agreed among all jurists because similarity is not possible here. The fungible was defined before as the thing having a similar one in the markets with no significant difference and with similar units and parts so that some of them might stand for others without significant difference, a matter which does not apply to usufructs and incorporeal rights, as they are intangible and cannot be compensated for as a fungible. Therefore, it is clear that money, whether it is in the form of gold, silver, banknotes or copper, is compensated as a fungible if it becomes a subject of *ghasb*, such as usurping money and that

money is damaged. In such a case its compensation shall be a fungible compensation with other similar money.

III. Judicial Rules Which Govern The Relationship Between An Existing General Agreement And Subsequent Specific Agreements Which Handle In Detail Matters Provided For In The General Agreements:

The presumption is that contracts and agreements indicate one intent of the parties, as each party agrees with the other on a certain obligation against a consideration or a usufruct, and this cannot be done unless such intent is determined from the contracts and agreements.

However, sometimes there might be a conflict between the contracts and agreements for different reasons, such as generalization (*a'am*) and specificness (*khas*), what is imperative (*la'zim*) and what is optional (*ja'iz*), being former (*ta'qdeem*) or being latter (*ta'kheer*), a matter which should be resolved by the parties, and if they do not reach an agreement about what was really agreed upon, then the court shall have the role of deciding on the matter and finalize the dispute.

The Saudi Law is based on a number of significant Islamic law maxims and judicial preponderating factors, which govern the disputes between the parties when there is a conflict between the concluded contracts and agreements in a way that serves justice and removes the injury. These maxims and preponderating factors can be detailed as follows:

First maxim:

One of the maxims in this context is that: (*al-amoor bi maqasidiha*), which means (things are identified by their intents). This is the first of the five major maxims in the Islamic jurisprudence from which all maxims branch out. One of the important maxims branching out of this major maxim is the main juristic rule in the field of contracts, which is: "*alibra fi al-uqud lil-maqasid wa al-ma'ani, wa laysa lil'alfaz wa almabani*" (the relevance in contracts is for intents and meanings, not for words and formulations). This rule indicates that what matters in contracts is not the mere

or apparent words, and not the written documents signed by the parties while they act otherwise, but rather the fact that the contract is an offer and acceptance, even if not written or documented. Therefore, once there is an offer and acceptance, there is a contract. However, the writing of a contract is just for documentation and records, and does not mean that there are no other obligations on the parties towards each other. In case there is a conflict concerning matters not provided for in the contract, then such matters should be proved by the recognized methods of proof, as what matters jurisprudentially and judicially is the substantive meanings and intents.

Based on the foregoing, the Saudi courts exercise verification in the meanings, subjects and intents of the contracts, and make them the crucial thing in contracts and shall rely on them in case of conflict. Therefore, if the contract cannot include an express provision imposing a certain obligation on one of the parties, and upon execution of the contract this provision was not implemented and the parties accepted this but did not amend the contract or cancel that provision in writing, then in this case the court will not give consideration to that provision based on the foregoing rule, even if it was stated in the contract that any amendment thereto should be in writing, because what matters in view of the court is the meanings of contracts and their substantive intents.

Second maxim:

One of the Islamic maxims through which the Saudi courts look into the relationship between the parties in case of conflict is the maxim that: *"al-asl anna lil halati min al-dalalati kama lil maqalati,"* which means (the presumption is that the situation has an indication similar to that of an expression). This maxim denotes that if the situations and circumstances indicate the existence of something, this will be similar to an indication given by an expression or words, whether the expression was verbal or in writing. If the contract includes a provision which the situation and circumstances indicate that it is ignored and not implemented by

the parties, then it is not necessary that the parties agree to cancel it whether by words or in writing, and shall be considered as null and void if the situation so indicates.

This means that through this maxim, the courts look into the indication given by the situations and circumstances if there is a conflict, so as to determine what was really agreed upon by the parties and find out the true intent of the parties.

Third maxim:

One of the maxims that governs the relationship between the parties when there is a conflict in contracts and agreements is that: "*al-asl annahu la yunsab ila sakitin qawlun, lakinna al-sukut fi ma'aridh al-hajati bayanon,*" which means (the presumption is that no statement is attributable to a silent person, but being silent when there is need to talk is a statement). This maxim indicates that it is presumed that being silent is not considered a kind of statement, but when the situation necessitates talking and making a statement, and the concerned party resorts to silence, this will be considered as a statement indicating the real situation. Consequently, through this maxim the true intent of the parties can be determined, as the silence of one of the parties for neglecting one of his conditions, while he is aware of the recurrent and continuous conduct of the other party in a way contrary to that condition, and that this necessitates stating his opinion with respect to that conduct, then this indicates that the said condition is not given consideration.

This means that, upon looking into such a dispute, the court has to verify the indication of the silence of one of the parties on neglecting one of his conditions, especially if such a condition is significant and important, because the parties may agree on a condition and then that condition may be amended or cancelled upon performance of the contract without being put in writing, and although the written agreement has provided for such a condition, yet the court will not give it a consideration, as the intent of the contract-

ing parties is wider than the terms and conditions of the contract.

Fourth maxim:

One of the maxims that governs the relationship between the parties when there is a conflict in contracts is that: *"al-izn al-dhimni ka sa'reeh al-izn, aw ma dalla ala al-izn fahuwa izn,"* meaning that (the implied permission is like express permission, or what indicates permission is a permission). This maxim indicates that permission does not need to be an express permission, written or verbal, but rather, anything that indicates permission is considered a permission. As such, if the contract includes a condition that may not be neglected except by permission from the party who stipulated it, and the course of conduct was contrary to that condition, and the situation indicated that the stipulating party did not insist on implementing it, and was silent about neglecting it, while being aware of that, and a long period of time has elapsed, with which his ignorance or lack of consent can not be imagined, and with recurrence and continuation of a course of conduct contrary to that condition, this indicates acceptance and implied permission which is equal to express acceptance and permission in its cogency.

Fifth maxim:

One of the important maxims which governs the relationship between the parties in case of a conflict in contracts is the indication of words which is: *"al-khas yukhassis al a'am, aw al-khas muqaddam ala al-a'am, aw alkhas yaqdhi ala al-a'am,"* which means (the specific limits the general, or the specific comes before the general, or the specific nullifies the general). This maxim demonstrates the strength and preponderance of the specific when there is conflict in contracts. Consequently, if one contract is specific and the other is general, or if a contract includes a general term which is conflicted by a specific term, then the rule is that the specific supersedes the general. This is because the indication of the specific is conclusive while the indication of the general is suppositive, and the conclusive is stronger than

the suppositive and supercedes it. For instance, if the contract is a general one or if the contract refers to a certain subject in general, and then a specific provision comes in the contract and handles that subject, then the consideration shall be given to the specific provision. Likewise, if a specific contract comes after a general one, then consideration will be given to the specific contract.

Sixth maxim:

One of the important maxims in the field of conflicting contracts, and which is useful in determining the intent of the parties is: *"al-ibratu bil aqd al-muta'akhir,"* which means that consideration shall be given to the latter contract, and that the provisions of the latter contract shall be relied on when there is a conflict between a former and a latter contract, as the latter constitutes the last agreement between the parties, and repeals the former in case of a conflict. This means that the court should verify this by knowing the date of concluding the contract and the date of conflict and difference.

These are the most significant maxims on the basis of which the Saudi courts look into the dispute and which govern the relationship between the parties in case of conflict between the contracts.

In addition to these maxims there are a number of preponderating factors which assist in determining the intent of the parties and help in achieving justice in case of dispute between the partners. Some of these preponderating factors are:

(i) The most important factor is the knowledge of the course of conduct when performing the contracts as well as the conditions and circumstances which accompanied such performance, as the nature of performing the contract indicates the type of the contract and its reality, and knowledge of the accompanying conditions and circumstances assists in identifying and determining the intent of each party.

(ii) Determination of the date of dispute between the parties, and whether the dispute arose immediately upon the

performance of the contract and neglecting the condition, or whether it arose long time after that. If the objection happened immediately upon neglecting the condition, this preponderates that the party stipulating it is insisting on it. But if the objection happened after a long period of time, this constitutes a preponderant and presumption that he is not sticking to the condition, otherwise he should not have been silent for all that period.

(iii) One of the important preponderating factors which helps in determining the relationship between the parties when there is a conflict between contracts is knowing the nature of each contract. Some contracts are preliminary contracts followed by another detailed contract. The nature of the former differs in nature from the second one. The preliminary contract deals with the relationship between the parties in general, and sets the general scope and plan, while the second contract may be more detailed and expresses the intent of the parties clearly, correctly and accurately.

This means that knowing the nature of each one of the conflicting contracts helps in determining the intent of the parties in a way that conforms with what was agreed upon and preponderates in identifying the responsibility and relationship between the parties.

(iv) One of the preponderating factors which also helps in determining the relationship between the parties when there is a conflict between the contracts is knowing the history of their relationship, and whether there are lawsuits and complaints between them in courts, in the past or at present, and whether the currently pending suit is a result of the previous suits. This is because, sometimes a dispute arises between the parties in one of the issues which might affect the principle of good faith between the parties, and hence each one of them resorts to seeking some way to injure the other, and instituting counterclaims as a means of pressure on the other party; such as instituting suits against each other based on weak or feeble arguments, or sticking to the apparent text of contracts while the course of conduct continued to be otherwise for a long period, especially if the

contract was performed for several years, as it is natural to carry out an amendment or change upon performance or cancellation of some of its terms, and this gives a chance to one party to injure the other party.

This means that the court will be keen to know the history of the relationship between the parties, because this helps in determining the true contract and the nature of the obligations between the parties. It also helps in understanding the trends of the parties and their purpose behind the suits which they institute.

These are the most significant Islamic maxims and preponderating factors which determine the relationship between the parties when there is a conflict between the concluded contracts and agreements. It can be noticed that the Saudi law handles such a conflict objectively and not from formalities point of view. The Saudi Law does not look only into the written contract to find out the intent of the parties, but it looks into the reality of the contract, its nature and the way in which it came into existence.

المملكة العربية السعودية
وزارة العدل

بسم الله الرحمن الرحيم

الرقم ٦/٤٤٢٨٤٤
التاريخ ١٤٢٤/٩/٢٤
المرفقات ١٠٣٠

المرضوع :

صاحب السمو رئيس الهيئة الملكية للجبيل وينبع
ورئيس مجلس إدارة (سابك)

سلمه الله

السلام عليكم ورحمة الله وبركاته وبعد:-

إشارة إلى خطاب سموكم رقم ٨٢٩٤ وتاريخ ١٤٢٤/٥/١٢ هـ الموافق ٢٠٠٣/٧/١٢م المتضمن رغبة سموكم إيضاح القواعد المتعلقة بدعوى الغصب والأسس والعناصر التي تبنى عليها والتعويض الذي قد ينتج عن ذلك ، والقواعد القضائية التي تحكم العلاقة بين اتفاقية عامة قائمة واتفاقية خاصة لاحقة . . . الخ

تجدون برفقه دراسة حول الموضوع موضحا فيها الإجابة على ما استفسرتم عنه ، نأمل الاطلاع والإحاطة والله يحفظكم . . .

وكيل وزارة العدل للمساعد للشئون القضائية المكلف

سعود بن عبد الله آل عسكر
١٤٢٤/٩/٢٦

المملكة العربية السعودية
وزارة العدل

بسم الله الرحمن الرحيم

الرقم : .....
التاريخ : / / ١٤ هـ
المرفقات : .....
الموضوع : .....

- أولاً : تعريف الغصب ، وبيان عناصر دعوى الغصب :

١ - تعريف الغصب في اصطلاح الفقهاء :

عرف فقهاء مذهب الحنابلة الغصب بعدة تعريفات ، فقد جاء في الإنصاف للمرداوي بأنه : " الاستيلاء على مال الغير قهراً بغير حق " .

وعرفه ابن مفلح بقوله " هو الاستيلاء على حق غيره قهراً ظلماً " .

وقيل : " هو الاستيلاء على مال الغير قهراً ظلماً " .

وعرفه البهوتي بقوله : " الاستيلاء على حق غيره مالاً كان أو اختصاصاً ، قهراً بغير حق .

- ويتبين من تعريف فقهاء الحنابلة للغصب أنهم يشترطون أن يكون الاستيلاء على مال الغير قهراً بقصد العدوان والظلم ، وقد ذكر ابن هبيرة الحنبلي -رحمه الله- ، وهو أحد فقهاء وقضاة الحنابلة في كتابه الإفصاح الاتفاق على ذلك إذ قال : " اتفقوا على أن الغصب أخذ يحدون قهراً " .

وقد قال المرداوي مؤكداً على أهمية هذا القيد " قهراً " مامعناه : " أنه لو استولى على حق غيره من غير ظلم ولا قهر فإنه لا يسمى غاصباً " .

وبهذا يظهر أن المعنى الاصطلاحي للغصب معنى خاصا يتضمن أوصافا وضوابط معينة ، وكذلك المعنى الاصطلاحي لكل من السرقة والاختلاس ، والفقهاء يفرقون بين كل منها على حسب الضوابط والأوصاف لكل فعل من هذه الأفعال ، ويرتبون ذلك أهمية كبرى ، فما لا ينطبق عليه وصف من أوصاف الغصب لا يسمى غصباً عند الفقهاء .

٢ - عناصر دعوى الغصب في القضاء السعودي :

يقوم القضاء السعودي على أحكام الشريعة الإسلامية ، وفق مذهب الإمام أحمد بن حنبل -رحمه الله- ، مع الإطلاع على آراء المذاهب الفقهية الأخرى ، والاسترشاد بأقوال المحققين من أهل العلم وأهل الفتوى .

* * *

المملكة العربية السعودية
وزارة العدل

بسم الله الرحمن الرحيم

الرقم: .....
التاريخ: / / ١٤هـ
المرفقات: .....
الموضوع: .....

تلك استعراض تناولاً موضوعياً ، وليس تناولاً من النواحي الشكلية ، فهو لا يجعل الطريق الوحيد لمعرفة إرادة المتعاقدين تابع من العقد المكتوب ، بل من حقيقة ذلك العقد وماهيته والصورة التي خرج عليها .

والله الموفق،،،

Supreme Court, U.S.
FILED
JUL 22 2005
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(4)

No. 05-155

In the
Supreme Court of the United States

SAUDI BASIC INDUSTRIES CORPORATION,
Petitioner,

v.

MOBIL YANBU PETROCHEMICAL COMPANY, INC., AND EXXON CHEMICAL ARABIA, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Kingdom of Saudi Arabia (the "Kingdom" or "Saudi Arabia") is a sovereign nation with a legal system that is vastly different from that of the United States and other western countries. The Kingdom's legal system is founded on Islamic law (*Shari'a*), which consists of the *Qur'an*—the Word of God revealed to the Prophet Muhammad—and the *Sunna*, the written account of the teachings and actions of the Prophet Muhammad. This foundation is buttressed by interpretations published by the jurists of four schools of *Shari'a* law. Of these four schools, courts in Saudi Arabia predominantly follow the opinions of the guild of Al-Imam Ahmad Ibn Hanbal.

It is invariably difficult for courts in the United States to ascertain and to understand the Kingdom's laws. Not only do the Islamic underpinnings of Saudi Arabian law differ fundamentally from the secular, common-law traditions of the American legal system, but Saudi Arabian judicial opinions are not published. Indeed, qualification as a *qadi* (judge) within the Kingdom requires complete mastery of the ancient holy texts as well as one's lifelong adherence to the dictates of Islam. It is unsurprising, therefore, that the trial court in this case—dealing with the Kingdom's law for the first time—expressed frustration in trying to discern the precise contours of *ghasb* (usurpation) under Saudi Arabian law.

In order to promote a proper understanding of the Kingdom's laws, however, the Saudi Arabian Ministry of Justice (the "Ministry") provides legal opinions in the

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Kingdom states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

ordinary course of performing its official functions. In response to a request by Petitioner, the Ministry prepared an official statement of law on the necessary elements and principles of *ghasb*. The Ministry's statement demonstrated that the trial court's fundamental misinterpretation of Saudi law resulted in the recovery of hundreds of millions of dollars in damages that would not have been awarded by a Saudi Arabian court.

The Supreme Court of Delaware, however, refused to give any consideration whatsoever to the Ministry's official statement of Saudi law. Its refusal to do so was based on grounds that directly implicate the sovereign interests of the Kingdom. When Petitioner sought to submit the Ministry's statement to the Supreme Court of Delaware, Respondents' opposition was based primarily on offensive accusations that the statement had a dubious origin, did not reflect the Kingdom's official and authoritative views, and amounted to "Saudi law 'on demand'" that had been provided by the Kingdom due to its status as Petitioner's majority shareholder. The Supreme Court of Delaware then ruled in Respondents' favor without explanation. One year later, when it issued its opinion affirming the trial court's decision in all respects, the Court for the first time cited Petitioner's failure to present the statement to the trial court as its rationale for wholly rejecting what it derisively called "that 'official statement'" of Saudi law. Pet. App. at 15a.[2] In its denial of rehearing, the Court additionally noted the "apparent" need to cross-examine a designee of the Kingdom "because what SABIC had portrayed as an 'official statement' of Saudi law by the 'Ministry of Justice' appeared to be an anonymously-authored 'study' forwarded under cover of a

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[2] "Pet. App." denotes references to the Appendix to the Petition.

letter signed by an 'Acting Assistant Deputy' whose authority and credentials were not disclosed." Pet. App. at 92a n.5.[3]

The Kingdom submits this brief *amicus curiae* in the interest of promoting due regard for principles of international comity as well as the proper interpretation and application of its own laws. It is essential for this Court to understand, when considering the importance of the question presented by this Petition, that the Supreme Court of Delaware upheld the award of hundreds of millions of dollars based on fundamental departures from the governing law of Saudi Arabia, and that this result was a direct outgrowth of the state court's inexcusable disregard for an official statement of the Kingdom concerning the force and effect of its own laws. The Kingdom urges this Court to correct the affront to foreign sovereignty caused by the Supreme Court of Delaware's refusal to consider—let alone accord the "due respect" required by controlling principles of comity to—the Ministry's official interpretation of Saudi Arabian law. *Société Nationale Industrielle Aérospatiale v. District Court*, 482 U.S. 522, 546 (1987).

SUMMARY OF ARGUMENT

The trial court in this case decided at least two issues of Saudi Arabian law that formed the necessary predicate for the jury's verdict and unprecedented damages award on Respondents' *ghasb* claim. The Ministry's statement explaining the elements and principles of *ghasb*, issued on behalf of the Kingdom, demonstrated that the trial court's rulings were inconsistent with Saudi Arabian law. First, Respondents only alleged a secret taking of property, but it is a necessary element of a *ghasb* claim that the taking must have occurred openly. This is so because Saudi Arabian law

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[3] The Supreme Court of Delaware had nevertheless denied Petitioner's motion to remand the case so that the trial court could consider the Ministry's statement in the first instance.

draws a critical—here, dispositive—distinction between the "openness and notoriety" of a taking of property sufficient to state a *ghasb* claim and the stealth of other takings such as theft and embezzlement. Second, the damages principles relevant to this case ordinarily limit compensation in these circumstances to the value of the property allegedly taken and do not allow recovery for the type of extra-contractual "lost opportunity" damages that accounted for $324 million of the total damages award in this case.

The trial court's errors of Saudi Arabian law implicated the Kingdom's interest in the correct application of its own laws. The Supreme Court of Delaware, however, added offense to error by its "out of hand" refusal even to consider the Ministry's statement. The Ministry's statement was a declaration of Saudi Arabian law issued on behalf of the Kingdom in the ordinary course of performing its official functions, and such a statement of a sovereign *qua* sovereign warranted consideration and respect from the Supreme Court of Delaware. The statement, moreover, was at the very least a persuasive and relevant exposition of foreign law from a highly qualified source that the Supreme Court of Delaware properly should have considered in its *de novo* review of the trial court's conclusions of Saudi Arabian law.

Finally, the creation of a state procedural rule foreclosing consideration of a foreign sovereign's official explanation of its own law, when submitted for the first time on appeal, is manifestly unreasonable and violates principles of international comity. Due regard for the sovereign interests of the United States would surely foreclose a state rule barring consideration of the United States' views on an issue of federal law unless the United States had appeared as an *amicus curiae* in the trial court. And there is simply no justification for a different rule merely because the sovereign is foreign.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RESTS UPON A FUNDAMENTAL MISINTERPRETATION OF THE LAW OF SAUDI ARABIA THAT WOULD HAVE BEEN AVOIDED BY CONSIDERATION OF THE MINISTRY'S STATEMENT EXPLAINING THE KINGDOM'S LAW

The lion's share of the unprecedented damages awarded by the jury in this case rested entirely on two trial-court rulings on the Saudi Arabian law of *ghasb*: (1) that Respondents could proceed with a *ghasb* claim even though they alleged only that Petitioner had acted secretly and deceptively, not openly or with their knowledge, and (2) that Respondents could recover all profits Petitioner allegedly realized by supposedly overcharging them for certain royalty payments. Having refused even to consider the Ministry's authoritative interpretation of the necessary elements and principles of such a claim, the Supreme Court of Delaware concluded on appeal that "no basis ha[d] been shown to overturn" the trial court's rulings of Saudi Arabian law. Pet. App. 50a. As the Ministry's official statement demonstrated, however, the trial court's twin rulings were erroneous as a matter of Saudi Arabian law.

First, it is one of the basic "juristic controls" of *ghasb* that the taking of another's property must have been forcible and open. Pet. App. 303a–305a. As the Ministry explained, a thorough analysis of the views of Hanbali jurists shows that *ghasb* necessarily "occurs by way of openness and notoriety from its beginning to its end" because it is defined by the "conquering" and "humiliation" of the victim. *Id.* at 304a. "The nature of *ghasb* . . . is that the usurper does not hide and does not intend to take the property in circumstances lacking help and rescue, but rather he takes the property by way of openness, notoriety, force, aggression and injustice." *Id.* at 307a. In this regard, *ghasb* connotes particularly offensive and overt conduct going beyond the ordinary violation of a

legally protected interest that often gives rise to a commercial or contractual dispute.

Thus, conduct sufficient to support a *ghasb* claim is distinguishable from, and does not encompass, conduct sufficient to support claims such as theft and embezzlement, because the latter are accomplished "not by way of force, but rather by way of stealth." *Id.* at 304a; *see also id.* at 307a ("[*G*]*hasb* . . . differs from theft in that *ghasb* involves the meaning of force, openness and notoriety of the act from its beginning to its end, contrary to theft which involves stealth. Also, *ghasb* . . . differs from embezzlement and cheating, as the *ghasb* . . . is taking property by way of force and openness."). "[T]he element of openness is essential to *ghasb*," and in this case was dispositive as to "whether there is *ghasb* . . . or not." *Id.* at 304a. Because Respondents' *ghasb* claim was founded solely on the charge that "SABIC had *secretly* overcharged the partnerships for technology that SABIC had licensed from Union Carbide Corporation," a correct application of the Kingdom's laws would have precluded *ghasb* liability in this case. Pet. App. at 2a (emphasis added).

Second, even where *ghasb* is established, Saudi Arabian law limits compensation to a return of the actual property taken, or, where not possible, its substantial equivalent. Pet. App. at 311a. This is so because the fundamental aim of *ta'aweedh* (compensation) is "to redress the injury which actually occurred, . . . and therefore, it is necessary that the compensation be assessed on the basis of covering the injury actually sustained no more no less." *Id.* at 310a. Compensation for "lost opportunity . . . by reason of damage to property or *ghasb* . . . , since there could be a chance for investing the property during [the] *ghasb* . . . period," is also forbidden "by unanimous agreement of jurists," for such an award essentially would amount to usury (*riba*), which is strictly prohibited by Islamic law. *Id.* at 311a; *see also id.* at 312a (Saudi Arabian courts "do not advocate awarding

compensation to the affected party for lost profit, as this is a speculative injury"). Accordingly, while damages may be awarded for the taking of another's property in circumstances showing liability for *ghasb* if the return of the property taken is impossible, the award is in principle and in practice limited to the property's value "according to the judicial and juristic rules, and should not be more than that." *Id.* at 311a. Indeed, even the trial court's own independent expert correctly concluded that a contemporary Saudi Arabian judge would not award indirect damages in the circumstances of this case. The trial court, however, instructed the jury that it could award not only Respondents' direct losses, but also indirect damages relating to Petitioner's profits from its use of the allegedly taken property, and there is no dispute that $324 million of the total damage award represent the latter.

It is clear, therefore, that the trial court's failure to adhere to the fundamental tenets of *ghasb* and *ta'aweedh* was critical to the jury's verdict and damages award. It is also clear that, had the Supreme Court of Delaware considered and accorded due deference to the Kingdom's authoritative exposition of these principles, it could not have *affirmed* the $324 million portion of the trial court's award that was based solely on Respondents' theory of *ghasb*.[4]

II. THE DELAWARE SUPREME COURT'S REFUSAL TO CONSIDER THE KINGDOM'S INTERPRETATION OF ITS OWN LAWS CONTRAVENED PRINCIPLES OF INTERNATIONAL COMITY

The trial court's distortion of Saudi law is itself troubling because the Kingdom has an interest in promoting a correct understanding of its own laws at home and abroad. The

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[4] The Ministry's statement also addressed principles of contract law relevant to other aspects of the case. On any remand the state courts should also, of course, give due regard to those portions of the statement.

Supreme Court of Delaware added offense to that error, however, first by rejecting "out of hand" the Ministry's authoritative explanation of the necessary elements and principles of *ghasb*, and then by entertaining and impliedly adopting Respondents' bald accusations about the dubious origin and suspicious nature of the Ministry's statement.[5] This Court should grant the Petition and instruct the Delaware courts to consider and accord due respect to the Ministry's statement of the Kingdom's laws for the following reasons.

First, the Ministry's statement was an official declaration of Saudi Arabian law issued (at Petitioner's request) on behalf of the Kingdom. Neither Respondents nor the Supreme Court of Delaware had any grounds to question the authenticity or authoritativeness of the Ministry's statement. The Ministry undertook an extensive review of the relevant texts and authorities after Petitioner made its request directly to the Minister of Justice, and after more than two months of study issued the statement under the signature of the Acting Assistant Deputy Minister for Judicial Affairs, Saud Bin Abdalla A'al Askar, on behalf of the Ministry. The Deputy Minister for Judicial Affairs has responsibility for providing opinions on the proper interpretation of Saudi law, and his Assistant Deputy signed the statement in the ordinary course of performing the Ministry's official functions.

The Supreme Court of Delaware should have accorded the Ministry more respect than an ordinary expert, whose opinions a court might reject as ill-supported. The Ministry's statement is not the mere "opinion" of an expert for hire; it is

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[5] Respondents attacked the Ministry's statement as one of "dubious origin," as not authoritatively representing the views of the Kingdom, and as "smack[ing] of Saudi law 'on demand'" and having "all the earmarks of bias." Response to SABIC's Motion For Acceptance Of New Saudi Law "Study" Into Appellate Record at 1–3 (filed Oct. 31, 2003).